United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

74-2373

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

vs.

ELMER E. HORNBERGER,

Appellant.

On Appeal from Judgment of Conviction, 26 U.S.C. §§7201 and 7206(1); E. D. N. Y., Before Mishler, J. and a Jury

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APPENDIX TO APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
DEC 4 1974
SECOND CIRCUIT

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APPENDIX

Docket Entries

Date	*Proceedings*
4- 4-7[illegible]	Before Dooling, J. Indictment filed.
4-15-74	Before Mishler, Ch. J.—Case called—Deft and counsel present—Deft ned and enters a plea of not guilty—Deft O.R.—30 days for motion set for 6-17-74.
4-15-74	Notice of appearance filed.
4-16-74	Certificate of Engagement filed—Case set down for trial for June 17, 1974, subject to engagement before Hon. Whitman Knapp of U.S.D.C. Southern District of NY etc.
4-18-74	Notice of readiness for trial filed.
5-17-74	Before Mishler, Ch. J.—Case called—adjd to 6-20-74 at 2:00 P.M. pretrial and possible selection of jury.
6-20-74	Govt's Pretrial memorandum filed.
6-20-74	Govt's request for jury selection filed.
6-20-74	Before Mishler, Ch. J.—Case called—deft and counsel Louis Bender present—Pre Trial Conference held and concluded.
6-24-74	Before Mishler, Ch. J.—case called—deft and counsel present—Trial ordered and Begun—Jurors selected and sworn—Trial contd to 6-25-74.
6-25-74	Before Mishler, Ch. J.—case called—deft and counsel present—trial resumed—Trial continued to June 26, 1974.

Docket Entries

Date	*Proceedings*
6-26-74	Before Mishler, Ch. J.—case called—Deft and counsel present—trial resumed—Trial contd to 6-27-74.
6-27-74	Before Mishler, Ch. J.—Case called—Deft and counsel present—Trial resumed—Govt rests—Motion by deft for a judgment of acquittal as to counts 5 and only is granted and motion denied as to the rest of the counts in the indictment—Trial contd to 6-28-74 at 10:15 A.M.
6-28-74	Before Mishler, Ch. J.—Case called—Deft Hornberger and counsel present—Trial resumed—Both sides rest—Stipulation for a verdict of 11 jurors if necessary was signed by the parties and approved by the court—Court ruled on request to charge—Trial cont'd to 7-1-74.
7- 1-74	By Mishler, Ch. J.—Order undated filed that in the event a member of the jury is unable to continue to verdict, then the parties hereto will accept a unanimous verdict of 11 members of the jury.
7- 1-74	Before Mishler, Ch. J.—Case called—Deft and counsel present—Trial resumed—Motion by the deft to reopen the case is granted—Deft renews his motion to dismiss—Denied—Both sides rest At 4:15 P.M. the jury retired for deliberations At 9:15 P.M. the jury retd and rendered a verdict of guilty on counts 1, 2, 3, 4, 6, 7, 9 and 10—Jury polled—Jury discharged—Trial concluded—All motions reserved until time of sentence—Bail condition cont'd—Deft to report to probation dept on July 9, 1974—Sentence adjd without date—Memorandum of verdict signed by the foreman and ordered filed by the court.

Docket Entries

Date	*Proceedings*
7- 2-74	Memorandum of Verdict filed.
7- 2-74	By Mishler, Ch. J.—Orders of Sustenance filed.
7- 9-74	5 volumes of stenographic transcripts filed (pgs 1 to 929).
7-12-74	Stenographers transcript filed dated July 1, 1974.
7-13-74	Before Mishler, Ch. J.—case called—deft and counsel Louis Bender present—motion to set aside verdict is argued and denied—deft is sentenced to imprisonment for a period of one year and one day on each of counts 1, 2, 3, 4, 6, 7, 9 and 10—said terms to run concurrently. Deft O.R. pending appeal. Court advised deft of his right to appeal.
9-13-74	Judgment and Commitment filed—certified copies to Marshal.
9-23-74	Notice of appeal filed.
9-23-74	Docket entries and duplicate of notice of appeal mailed to court of appeals.
11- 4-74	Stenographers transcript filed dated 6-20-74.
11- 4-74	Record on Appeal certified and mailed to the Court of Appeals.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

- against - : 74-CR-251

ELMER E. HORNBERGER, :

Defendant. :

- x

United States Courthouse
Brooklyn, New York
June 20, 1974
2:00 o'clock p.m.

B e f o r e:

HONORABLE JACOB MISHLER, CHIEF U.S.D.J.

DANIEL D. SIMON
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.,
United States Attorney
for the Eastern District of New York

BY: JOSEPH W. RYAN, JR., ESQ.
Deputy Chief Assistant United States Attorney
Of Counsel.

LOUIS BENDER, ESQ., and
ALLEN WOLFSONT, ESQ.,
Attorneys for Defendant

- - -

* * *

MR. BENDER: And the indictment merely charges 7206(1) Counts, Counts 9 and 10 on Homes, and by Homes meaning Storybook Homes. And the rest are attempts to evade an defeat the taxes from these corporations plus two individual Counts, 1 and 2, against the defendant himself for evasion based upon the constructive dividend theory, namely, that this was corporate money which he constructively received, and it is a constructive dividend which he should have reported on the return.

Am I right, Mr. Ryan?

MR. RYAN: Essentially.

R2 fls (Continued on next page.)

DDS:MM
T1R2

Now, your Honor, with respect to the 93 buyers.

THE COURT: Well, it is slightly different than I understood it to be.

Then it is not money that the Government claims this defendant received and should have reported on his personal income tax return --

MR. RYAN: He should have reported it on both, both the corporate and his individual.

If you examine the pre-trial memorandum there is a case Roth against the United States, which I think spells out as clearly as possible the Government's theory.

In other words, these monies that he had received arising out of the construction --

THE COURT: Will you first tell me how he received it? Were the monies made to the corporation by cash or check?

MR. RYAN: No, pursuant to the defendant's instructions they were made to the defendant personally. He deposited them --

THE COURT: In his name by personal?

MR. RYAN: Correct. They were deposited into his personal account.

THE COURT: Is that a consistent policy throughout all of that?

MR. RYAN: All 93 transactions.

THE COURT: All money for extras were made out to him personally. He deposited all to his personal account?

MR. RYAN: Right.

THE COURT: And he failed to report anypart of it?

MR. RYAN: Correct.

THE COURT: Either in the corporate return or his own.

MR. RYAN: Correct. And under the law that we recite, your Honor, He should have reported it on both.

THE COURT: Or, on any, if the theory was that it was corporate --

MR. RYAN: Income.

THE COURT: -- income.

MR. RYAN: It was.

THE COURT: Or he possibly could have made out a personal effort, being his own contractor, for extras, and received it on his own account.

MR. RYAN: It could be the defense theory. I don't know if it is. But we are prepared to prove that it was in fact a corporate transaction. The corporation bore the costs, of all of these extras

there was no differentiation in the treatment of the manner in which the extras were --

THE COURT: DO the extras fall into any classification? Are they extras for equipment, or additional basements, or finishing, or --

MR. RYAN: Insulation is one predominant item, painting, and probably there are other items such as fireplaces and things of that nature.

THE COURT: THen did the corporatins subcontract this out to an insulator?

MR. RYAN: I'm not exactly certain. But I know that the bills were paid by the corporations.

THE COURT: Paid by the corporations?

MR. RYAN: Paid by the corporations.

So we believe our evidence will show that these were definitely corporate transactions. The defendant knew it. He deposited, nonetheless, the money to his personal bank accounts, andit had been gross income to the corporation, should have been included in the corporations gross income. The defendant being the sole stockholder, having received corporate distribution of monies, he should have reported it on his personal income tax returns as a corporate dividend.

THE COURT: How about the Chapter S corporations where it really is ---

MR. RYAN: Same principle.

THE COURT: Is it a corporate --

MR. RYAN: Same principle. The Chapter S still has to file a small business corporation tax return where he has to state the gross income of the corporation.

The Government charges that these extras should have been included in the gross income of the corporation on the income return filed with the Government.

In addition since he has received these corporate monies he should have reported them on his individual income tax return as a dividend from the Subchapter S corporation.

THE COURT: Well, under Chapter S he probably would report the profit as personal income.

MR. RYAN: Well, in the tax returns that were filed monies he did report for the Subchapter S corporation were included in the miscellaneous income box on his individual income tax return.

THE COURT: Do you see any difficulty in sustaining a theory on the Chapter S corporation that this was a corporate expense?

MR. RYAN: No, it was a corporate expsense. We are prepared to prove that.

THE COURT: I know, but in effect he is using the corporation just as a conduit under Chapter S, isn't

he?

MR. RYAN: Well, the point is that he was required to, nonetheless, report these monies on his Subchapter S information return and to that extent the indictment charges that he filed a false return. It doesn't charge tax evasion because that is a small chapter S.

MR. BENDER: I know, but you are including, as I understand it, the extras which you were claim were omitted from the subchapter S as additional income to the defendant which he should have reported in 1967 and 1968.

THE COURT: Yes.

MR. BENDER: Is that correct?

MR. RYAN: That is correct.

THE COURT: That sounds as a theory consistent with the theory of Chapter S. I thought there might be difficulty.

MR. RYAN: I know, but the whole theory is, as I understand it, it is income to the corporation and by virtue of the fact that it is income for the corporation to the extent that it went into Mr. Hornberger's hands it became a constructive dividend which should have been reported on his individual tax return. So it falls or rises depending upon whether

or not it was a constructive dividend from the corporation.

MR. RYAN: If I may state this, that the only effect of this one corporation being a Subchapter S, is that there is no tax evasion charges arising --

THE COURT: Yes, I understand. I do not know that the Government is bound bythe same theory as it is with the other corporations because there are two things in the Chapter S, first a true information return should be filed --

MR. RYAN: Correct.

THE COURT: -- as if it were a partnership.

MR. RYAN: The same principle.

THE COURT: Then it is reportable as income to the individual. So if he failed to report it and he did so knowingly then it also becomes, in my opinion, if it is proved, a fraud, an evasion --

MR. BENDER: Not an evasion.

MR. RYAN: Individual tax.

MR. BENDER: They are charging him twice, once in an evasion from that income on his own individual --

THE COURT: Yes.

MR. BENDER: -- and then a false statement on the corporate return.

THE COURT: So I think it is clear.

MR. BENDER: That is correct. I raise no valid legal objection to the question of whether or not you can charge a 7206(1) on a Subchapter S.

THE COURT: Well, I can hear that another time. Offhand I see no problem.

MR. BENDER: At the moment I see none either.

THE COURT: That's right.

* * *

MR. BENDER:

* * *

I have -- what I have offered to stipulate is this, that these people had contracts, or had agreements for extras, and that they were instructed that the extra checks should be made payable to Mr. Hornberger personally.

THE COURT: Did Mr. Hornberger instruct them to do it?

MR. BENDER: I have no objection -- not that he himself did it but either he or people in his employ.

THE COURT: No. But was it at his instruction?

MR. BENDER: THere is no question that it was at his instruction to various employees in his office that extra checks should be made payable to him personally.

* * *

(Twelve jurors and two alternates were duly sworn.)

THE COURT: Once again, the jury has now been sworn. How many have sat on a jury before?

(Four jurors raised their hands.)

THE COURT: For the benefit of the others, I'll tell you something about what a trial consists of. I warn you it's nothing like you watch on television. A trial on television is compressed into a half-hour's entertainment or an hour's entertainment and it's intended as entertainment and not for the serious business of trying a defendant on the charges.

At the outset, the lawyers have the opportunity of outlining what their positions are. What they say, of course, is not evidence, but it's very helpful to the jury. They outline. The juros will better be able to understand testimony when they know the positions of the parties, to be able to place the testimony in the proper place with relation to the positions of the parties.

After the opening by the lawyers, the Government then calls its first witness and the defendant has the opportunity of cross-examining the witness. If a lawyer wants to have additional questions, we have redirect and then the defendant may cross-examine. We have a direct examination, the cross-

examination, the redirect and the recross.

You'll find certain documents referred to. The lawyers have met before this trial and they've agreed that certain documents may be marked in evidence. That saved a lot of time.

There may be other documents that are marked for identification. They're not in evidence. So, you may not see these. You may only see what is actually marked in evidence.

Identification means only that the witness has identified a document and it's marked so that if someone ultimately reads the transcript they'll know what the witness is referring to.

The Government puts in all its evidence and the defendant has the opportunity to offer evidence. The defendant doesn't have to offer any evidence, but if the defendant offers evidence, then the Government's lawyer may cross-examine the defendant's witnesses.

All that, when it's over, the lawyers have the opportunity to address you again. This time, in reversed order. Mr. Ryan opens first and Mr. Bender opens second. In summation, Mr. Bender sums up first and Mr. Ryan sums up second. After all that is done, I then charge you on the law. After that, you go into the jury room and you deliberate on each count of the

indictment to see whether the Government proved its case beyond a reasonable doubt and you arrive at a verdict.

Now, when the Court charges and you go into the jury room to deliberate, that, for the first time, is the opportunity and the duty of the jury, to talk about the case, to talk about the evidence. Before that time, the jury is under order of the Court not to discuss the case with anyone, not even amongst yourselves. It's very important that you adhere to that admonition.

When you render a verdict, I'll call you back to the courtroom. I'll ask the foreman to stand and render the verdict. That's the end of the case.

That, in brief, outlines a trial and those are the various steps a trial consists of.

I'll suspend at this time until 1:30. At that time, we'll hear the opening remarks by Mr. Ryan and Mr. Bender. The jury is excused for lunch.

My courtroom deputy will show you where the jury room is adjoining this courtroom and how to get out of the courthouse from the interior halls. The jury is excused for lunch. Please be back at 1:30.

(Jury leaves the courtroom.)

THE COURT: When can I expect the request to

charge in this case?

MR. RYAN: Would Wednesday be all right?

THE COURT: Surely. The end of the day, say about 4:00 o'clock.

MR. RYAN: I'll work on it.

MR. BENDER: I can give you a general request on the elements of the offense, but on the particulars, I would like permission to hold that until we can see what the case shows.

THE COURT: See what you can get by Wednesday afternoon.

MR. RYAN: Two things: Have the records arrived yet?

MR. BENDER: The records have arrived.

MR. RYAN: Then I have 3500 material I want to make available. I won't mark it now. I'll mark it after.

THE COURT: I want it recited for the record and marked. Everything that's turned over must be marked.

I may very well get up a form of verdict. It consists of ten counts.

MR. RYAN: I think it will be helpful to the jury.

THE COURT: I'll submit the form of verdict

before the jury gets it so that you can make any suggestions or objections if I decide to get it up. It contains too many counts and at least two different theories. I think we ought to have something before them so they can decide it intelligently.

MR. BENDER: Is it your intention, your Honor, to sit until 4:30?

THE COURT: I go beyond 4:30. Think of going closer to 5:00 o'clock today and maybe a little later tomorrow. I must suspend. I think today, I think at 4:30 for a sentencing panel.

MR. BENDER: I didn't know that you would go so late. I have made a 5:30 engagement. In another case, up at 10 East 40th Street, so that I just won't have enough time.

THE COURT: I'll try to get through at 5:00. Tomorrow, I can't because --

MR. RYAN: I have a lot of witnesses here today.

THE COURT: We'll do the best we can.

MR. BENDER: I can't postpone because there are four defendants coming in from New Jersey. We have Jerry London and Joe Brill.

THE COURT: Ask the lawyers to entertain your client for a little while.

MR. BENDER: I will call them and tell them I'll

be a little later if your Honor wants to proceed further.

THE COURT: Please mark the 3500 material.

MR. RYAN: Continue with the numbers. We stopped at Exhibit 115. These are additional materials for identification that you have not been furnished.

116, grand jury minutes, of Victoria Coletti.

THE CLERK: So marked, Government's Exhibit 116 for identification.

(So marked.)

MR. RYAN: Grand jury minutes of Charlotte Waugh.

THE CLERK: So marked as Government's Exhibit No. 117 for identification.

(So marked.)

MR. RYAN: Correspondence between Benjamin Greshin and the Internal Revenue Service.

THE CLERK: Consisting of four pages, marked Government's Exhibit 118 for identification.

(So marked.)

MR. RYAN: Grand jury minutes of Thomas Canale.

THE CLERK: So marked as Government's Exhibit No. 119 for identification.

(So marked.)

MR. RYAN: Affidavit, Rita Perrin.

THE CLERK: So marked as Government's Exhibit No. 120.

(So marked.)

THE COURT: We'll continue this after lunch hour. 1:30, gentlemen.

(Luncheon recess.)

(Time noted: 12:30)

(Continued next page)

SS lpml fls

* * *

All of the buyers that are involved in this case bought these homes from Mr. Hornberger's corporation; contract of sale, Mr. Hornberger's corporation, to the buyer. All of the payments for the basic price, the model price, were made pursuant to the contracts to Mr. Hornbergers' corporations, but the extras were a different matter.

We will prove to you that Mr. Hornberger directed the buyers to pay him personally for the extras they ordered, and not to pay the corporations.

We will also prove to you thatwhen the Internal Revenue Service had commenced its investigation, Mr. Hornberger, knowing full well thathe had received $156,000 as income on extras and deposited them into his personal bank account, attempted to cover up what he had done when asked about this matter by the Internal Revenue Service, the special agent.

Mr. Hornberger deliberately lied to the

Internal Revenue Service when asked about these monies. He falsely told, we'll prove to you, the special agent that the source of these monies was not extras, but monies his mother, elderly mother, had given to him over the two years involved, and that his elderly mother got this money -- from the extras -- but from her-- who left the money from the defendants' father and Mr. Hornberger further lied and said that, "my father didn't get the money from extras. He got them from my grandfather," and that this was the source of these monies, we're now talking about, and not extras, and a deliberate, willful effort to conceal his criminal conduct in evading taxes.

* * *

lpm#2
SS/elc

* * *

For some 90 people, according to the government, that bought extras, and in order to save you and all of us this time, Mr. Hornberger has stipulated that if the 90 witnesses were called and produced the checks, that they would testify that they had extras, ordered from one or more of the corporations, and that in most of the instances, the checks, rather than being made out to the corporations that performed the extras, were made out personally to Mr. Hornberger, and that these checks were deposited in Mr. Hornberger's one-of-three accounts.

The Bank of Smithtown in 1967, which is in Long Island and in his own name, with his wife, Dorothy, who I believe is a co-signer; the Eastern National Bank, which is in Smithtown, his own name and in the Tinker National Bank nearby in Long Island, also in his own name.

I think that we have so stipulated, there were -- will be no necessity to parade all these witnesses about the Court. Mr. Ryan has indicated to me that he might want to call a few, and we will see who they are, these few and presumably these few are being

brought in to testify that they made the checks payable to Mr. Hornberger, rather than the corporation, either at Mr. Hornberger's request or at the request of some of the employees in Mr. Hornberger's office, but I tell you that we do not take issue with that.

As a matter of fact, we concede fully that instructions were issued to the girls in the office, as a matter of policy, company policy, and the witnesses for the government who have worked for Mr. Hornberger and his corporations will testify that it was Mr. -- it was the policy to send a letter out and instruct the buyer not only that they should agree to the extras that were ordered,listed on the corporation stationery, even one of the corporations, but that in most instances, starting after, I think, the first month in January of 1967, to make the checks payable to Mr. Hornberger.

I think you will find that it was in the main followed, and there were instances where they were not followed, and I think you will find it on Mr. Hornberger's instructions to the young lady who was in charge of the extras, that she should return the check made out to the corporation and instruct the buyerin writing that the check should be made to

Mr. Hornberger. Thosechecks, as I say, were deposited in the three bank accounts of Mr. Hornberger.

Now, you will also findout from proof that the total of $155,000, $42,000 in 1967 and $113,000 in 1968, were returned to the corporation. I think you'll find that checks were then taken out of the three individual accounts, into which the extras had been put and the entire $156,000, redeposited in the corporate accounts.

As a matter of fact, ladies and gentlemen, you'll find, even more than that, deposited in the corporate accounts, because Mr. Hornberger took his full salaries. He made 30,000 dollars in 1967. He made some $55,000 in 1968, or roughly a total of $80,000 some-odd thousand dollars, and just turned the checks back into the corporation.

Now, I think you will find from the evidence that Mr. Hornberger had a very good reason for having the checks made payable to him and having them placed in his individual accounts, and then having them re-deposited to all of the corporate accounts, anyway, in which he did.

* * *

J O H N W A L S H E, having been duly sworn by the Clerk of the Court, assumed the witness stand and testified as follows:

THE WITNESS: I do.

THE CLERK: Please state your last name and spell it.

THE WITNESS: John Walsh, W-a-l-s-h-e.

DIRECT EXAMINATION

BY MR. RYAN:

Q Mr. Walshe, would you tell us your occupation, sir?

A I'm in my own business. I own a Carvel Ice Cream Store.

Q Where is that located?

A Selden, Long Island.

Q Where do you presently reside, sir?

A 8 Robert Hill Court, Nesconsett.

Q When did you move into that house?

A February, '68.

Q Is it a one-family dwelling?

A Yes.

Q In a development?

A Yes.

Q From whom did you buy that house?

A Story Book Homes.

Q Can you tell us when you contracted to buy the house from Story Book Homes?

A When?

Q Yes.

A (No response)

Q The date, the approximate date?

A Well, I moved into the house in February.

THE COURT: When did you sign the contract to buy the house?

THE WITNESS: It was the summer of '67. The date -- it's -- I'll be honest with your Honor, so long back, something, some of these things are hard to recall.

BY MR. RYAN:

Q Did you have a contract with you?

A I have my closing statement with me.

MR. RYAN: Let me mark this document, please.

THE CLERK: three-page document marked Government's Exhibit 121 for identification.

(So marked)

BY MR. RYAN:

Q Let me show you 121 for identification.

(Handing to witness)

See if that refreshes your recollection as to when you contracted to buy the house.

THE COURT: Look at the very first line for the date.

THE WITNESS: September 8, '67. That was approximately it, the time.

BY MR. RYAN:

Q You contracted to have the house built; is tha right?

A Right.

Q Were you represented by an attorney?

A Yes.

Q What was his name?

A Mr. Gresham.

Q Did you look at a model home prior to signing the contract for sale?

A Yes.

Q Did you agree to purchase anything in addition to the basic model home?

A Well, I had some extras on the house.

Q First of all, are you telling us that you ordered extra work to be done?

A Yes.

Q What extra work?

A Let's see --

Q You're looking at a piece of paper now?

A Yes.

Q What is that?

A (Indicating)

Q Tell us what you're referring to?

A The extras that I had put on the house.

Q Tell us what extra work you bought.

A I ordered cabinets for the kitchen. I didn't take the ones that were on the house. I had extra insulation. I had all the woodwork stained and I had the house painted on the inside, and I had a refrigerator, dishwasher and dryer, and also a hookup.

Q Now, who did you talk to, if anyone, in connection with having those extras constructed in your home?

A Who did I talk to?

Q Yes.

A When I -- it's so hard to remember some of these, you know.

Q Do the best you can. That's all we ask.

A When I first went to the house, I went to the salesman, Mr. Font (phonetic). He was the one -- he was the one that I dealt with in the beginning, and all through.

Q Did you ever have any conversations with anyone else about it?

A As far as how I paid?

Q As far as ordering.

A It's probably -- it did have.

Q Did there come a timewhen there was a closing on your contract of sale?

A Yes.

Q Do you recall when that was?

A That was February 1, approximately, February 1, 1968.

Q Did you at that time pay for the extras you have testified to here?

A Yes.

Q How much did you pay?

A The extras came to $1931.

Q What was the purchase price of your house, do you recall?

A $27,500.

Q Did you borrow any money in order to have that house built?

A Did I borrow money?

Q Yes.

A No, I had a previous house that I sold in

Levittown, and that's where most of the money came from, but the money for my extras, I remember that was extra. I was told that was separate.

Q Who told you that?

A I just don't know who, whether it was Mr. Font, but I was told that would have to be a separate payment.

Q When you -- when were you told that, in relation to when you signed the contract in closing? Can you fix a time?

A I can't recall, believe me. As I have seen these papers, for the time, first time in seven years --

Q All right.

At the time of the closing, you paid $1931 for the extras?

A Yes, right.

Q Who did you pay the money to, and how?

A What happened was that on my closing on the Levittown house, I have a list of some of the checks, how they were paid out. I had paid a closing, a certified check, to the seller, Story Book Homes, for $7,500. I have another check for $843, and I think that was my own personal check, and then I had a certified.

Q Who was that payable to, the $843 check?

A Most of these checks were checks that were certified that I endorsed over on the other closing, on my first house.

Q Who did you eventually pay the money to when you bought the house from Story Book Homes?

A Who did I eventually?

Q Yes.

A Most of those checks were handled at the closing.

Q To whom did you pay the money, the closing with these checks?

A In other words, who I handed it to?

Q Yes.

A I really don't know . There was so much -- the check, though, for $843 was my own personal check.

Q Who is it payable to?

A Story Book Homes, Incorporated.

Q Who was the $1931 check?

A That's what I'm getting to now.

The other check was a certified check,which I don't have a copy of, and I think that's the check that was from the buyer of my other house, certified that I endorsed it, was made out to Mr. Elmer Hornberger, $1931.

Q Individually,as president of any corporation,

do you know?

A Listed on my closing statement from Mr. Gresham, it lists Elmer Hornberger. I haven't seen that check. Again, that was a bank check.

(continued on following page)

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BY MR. RYAN:

Q Were you given any reason at any time for making the payments for the $1,931?

THE COURT: Sustained as toform.

MR. RYAN: No further questions.

THE COURT: If you wnwant conversations, you can have conversations, Mr. Ryan. Would you like to ask -- would you like to pursue it, Mr. Ryan?

MR. RYAN: No. I am finished.

THE COURT: Mr. Bender.

CROSS-EXAMINATION

BY MR. BENDER:

Q How many people were at the closing, do you remember?

A I have a list who was there. There were a lot of people and I don't recall, believe me. If it was maybe a month ago, I couldn't.

Q What are you referring to? Is that that 121 for identification, which is the closing statement?

A Yes.

Q Is that your closing statement?

A Right.

Q That was a statement prepared by your own lawyer?

A Right.

Q And which was given to you?

A Right.

Q And that was for your use?

A Right.

Q How many people do you recall, and if you don't remember look at your closing statement, if that will help you refresh your recollection?

A There must have been 6, 7 or 8. I don't know.

Q I see.

And it was at that closing -- did you see Mr. Hornberger at the closing?

A Yes, he was at the closing.

Q Is this (indicating) Mr. Hornberger? Do you remember him?

A Yes, yes.

Q And at that closing you say you turned over a $1,931 cashier's check, which you had received? Endorsed it over to Elmer E. Hornberger personally for the extras?

A I didn't say I handed it to Mr. Hornberger. I don't remember who I handed. I just made that statement.

Q But it was at the closing -- that your closing statement referred to the fact that personal -- a check was given to Elmer E. Hornberger?

A In other words, when I bought the house in Levittown, a call was made to the people that bought the house, or the broker, to have the checks made out in a certain -- certain numbers for me for the closing.

Q ANd one of the checks which you made out was for the payment of the extras which you had originally agreed to?

A Right.

Q Before with the salesman?

A Right. It was not my own personal check.

THE COURT: Aren't you saying that one of the checks that you received for the Levitt house --

THE WITNESS: Was returned over.

THE COURT: Was made out to you in the amount of $1,931 and you endorsed that over to Elmer E. Hornberger.

THE WITNESS: Right.

THE COURT: Isn't that what you did.

THE WITNESS: Right.

THE COURT: All right. Go ahead.

MR. BENDER: I have no further questions.

THE COURT: Anything further?

MR. RYAN: No.

Thank you.

THE COURT: You may step down.

MR. BENDER: May I ask one more question.

THE COURT: Surely.

CROSS-EXAMINATION

BY MR. BENDER: (Cont.)

Q Did you in connection with the extras, did you receive a letter from the corporation requesting you to indicate that you had ordered the following extras, listed on the corporate letter?

A Did I -- I don't follow.

Q Did you ever receive a letter from the corporation that you -- from whom you agreed to buy the house, when you ordered the extras, saying that we understand that you have ordered the following extras?

A No, but I can recall I discussed it with my wife last night and she told me --

THE COURT: No.

Q No. Only your own recollection.

A I don't recall.

Q Do you ever recall receiving a letter of any kind from any of the company acknowledging receipt of your extras -- payment for the extras? Don't you remember? Okay.

MR. RYAN: Can you wait just a moment, please?

THE COURT: Are you finished, Mr. Ryan?

MR. RYAN: Would you bear with me a moment, please, your Honor?

MR. BENDER: While we're waiting, can I ask one further question?

THE COURT: Mr. Bender has another question. Go ahead.

CROSS-EXAMINATION

BY MR. BENDER: (Cont.)

Q Do you have a copy of your contract here?

A No, I don't.

MR. BENDER: Does the government have a copy.

MR. RYAN: Yes.

THE WITNESS: This is the one (indicating). I'm sorry.

Q Can I see that a moment, please?

A Yes, surely.

Q This contract, 121 for identification, that is the contract or copy of the contract that you entered into for the purchase of your home; is it not?

A Yes.

Q And at the time that you entered into the contract, you ordered extras over and above the main price; did you not?

A Right.

Q And those extras are specified right in the contract; are they not?

A I didn't have a copy. I couldn't find it, so I haven't even looked at this. If you'll give me a second, I'll look through.

Q Suppose you look at the first page.

A Okay. That was the painting, the finish work, right. Then I also had the dishwasher, the refrigerator.

Q And at the time of the contract, does that refresh your recollection that that's the only extras that you had ordered?

A That's all it says here. You know, again --

Q Do you recall after you signed the contract you may have ordered additional extras?

A It could be. You know.

MR. BENDER: I have no further questions.

REDIRECT EXAMINATION

BY MR. RYAN:

Q Is that your signature on the contract?

A The signature? Yes.

Q Is that a fair and accurate copy of the contract you signed?

A Yes.

MR. RYAN: I offer it in evidence.

MR. BENDER: I have no objection.

THE COURT: Let it be marked.

THE CLERK: Government's exhibit 121 previously marked for identification now marked in evidence.

(So marked.)

MR. RYAN: Thank you, Mr. Walsh.

THE COURT: Anything further of this witness? You may step down.

Thank you.

THE WITNESS: Thank you.

THE COURT: Next witness.

MR. BENDER: Did you want to see it, your Honor? I could see it after you get through. Okay.

Excuse me. Your Honor, may we approach the bench?

THE COURT: The jury may be excused. I do not take argument at side bar.

MR. BENDER: Oh.

THE COURT: It is just my way of listeningto argument. Most Judges call the lawyers up to side bar and the jury hears a lot of whispering and some jurors are offended because people are whispering

in their presence and some are curious and they try to get a word or two, so this is just an argument on a question of law and I ask the jury to be excused and the lawyers feel freer to argue about it and the jurors get a little exercise walking back and forth.

(The following occurred in the absence of the jury.)

MR. BENDER: I'd like to do this in the absence of the witness.

THE COURT: Right here. Put it all on the record.

MR. BENDER: I would like to do it in the absence of this witness.

THE COURT: Oh. Do you mind taking a position outside the Courtroom doors?

Thank you.

MR. BENDER: I appreciate your Honor doing this. I'm doing this in an abundance of caution because of the 3500 material I received on this man, if it's Mr. -- according to the 3500 material, this man made a complaint to the Internal Revenue Service, with respect to the direction that his client make the check for the extras payable.

THE COURT: Is this Mr. Greshin?

MR. BENDER: Yes. I just want to make sure that we don't have this come out before the jury. I think it's prejudicial. It's totally immaterial, irrelevant, that he made a complaint tothe Internal Revenue Service. So I don't know to what extent —

THE COURT: All right. I do not think that should come out. Sometimes, for reasons that I will not expand upon, defendants bring it out, but if you do not want it, of course.

MR. BENDER: I don't know whether that's his intention.

MR. RYAN: It doesn't matter. You don't want it, I won't bring it out.

MR. BENDER: All right.

MR. RYAN: Would you bring Mr. Greshin in, please?

THE COURT: Seat the jury.

(Jury present.)

THE COURT: You may proceed, Mr. Ryan.

THE CLERK: Would you stand, please?

(Continued on next page.)

B E N J A M I N G R E S H I N , residing at Cordwood Path, St. James, New York, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RYAN:

Q Mr. Greshin, would you tell us your occupation, sir?

A I'm a lawyer.

Q Where do you practice law, sir?

A Smithtown, New York. On Long Island.

Q How long have you been practicing there?

A Since around April 15, 1955.

Q Did you have occasion to represent one John Walsh in connection with the purchase of a home?

A Yes. I represented John Walsh, his wife Ruth, in the -- in connection with both the sale of a house and the purchase of a house.

Q All right. The sale of the house, where was that house located?

A Levittown.

Q And the purchase of a house, where was that house located?

A Nesconset, a small community in Smithtown.

Q Was it an existing building or was it one to be

built?

A The new house was to be constructed for the Walshes.

Q All right. Now, you represented Mr. Walsh at the contract signing, to purchase or have the house built?

A Yes.

Q Is that right?

A Yes.

Q Was there any discussion about extras in connection with the contract signing?

A Yes. The subject --

MR. BENDER: I'll object to anything further.

THE COURT: All right. The answer was "Yes." It's fully answered.

(Continued on next page.)

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DIRECT EXAMINATION

BY MR. RYAN: (Cont'd)

Q What was the discussion?

MR. BENDER: Excuse me. May we find out if the defendant was present at the time?

Q Who was present? Where did it take place and what was discussed?

A The discussions were at Mr. Wolfsont's office. Mr. Wolfsont being the attorney for Mr. Hornberger and his building corporation.

Q Excuse me, is Mr. Wolfsont in Court here today?

A Yes. Mr. Wolfsont is present.

Q In Mr. Wolfsont's office; is that correct?

A Yes.

Q All right.

What was discussed?

THE COURT: Was the defendant present?

THE WITNESS: I can't recall at this time. I'm sorry.

Q All right.

A The subject matter is treated in the --

MR. BENDER: I'll object to any gratuitous statements.

THE COURT: Strike it out.

BY MR. RYAN:

Q I show you Exhibit 121. It is in evidence. Do you recognize that document?

A Yes. This is a photocopy of the contract between Stonybrook -- Story Book Homes and Mr. and Mrs. Walsl

Q Is there any reference in there to extras -- extra work being done?

A Yes. It appears in two places. It is typed il above Paragraph One on the first page and it is written in my hand as paragraph Four on an addendum.

Q All right.

Now, did there come a time when title closed?

A Yes.

Q When was that?

A On January 31st, at 10:00 a.m. at the office of Roosevelt Savings Bank, I believe. I'm not sure now.

Q All right. Between the time of the contract signing which is September 7th, as you see on your exhibit before you, and the time of closing --

A September 8th.

Q I'm sorry.

-- and the time of closing, was there any communication between yourself and anyone on behalf of Story Book Homes in connection with extras?

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A Yes.

MR. BENDER: I object to anything further.

THE COURT: Answer only the questions asked. Everything else will be stricken.

Q The answer is yes?

A Yes.

Q What communications did you have and how did you have them?

MR. BENDER: Excuse me. May we first find out with whom he had the conversations because if it's not binding upon the defendant, I have a right to object.

Q With whom did you have the communications?

A My first communication, the only one of which I am quite sure, was a letter from Mr. Wolfsont. I believe I responded by telephone to it, but I can't tell you precisely the conversation in response. The letter I have.

Q May I have it, sir?

A Yes.

MR. RYAN: Would you mark this as the next Government exhibit, please?

MR. BENDER: May I see it?

MR. RYAN: Absolutely.

MR. BENDER: Is this for identification?

MR. RYAN: Yes, it is.

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MR. BENDER: I'm sorry.

THE CLERK: Letter dated January 4, 1968, marked Government's Exhibit 122 for Identification.

(So marked.)

MR. RYAN: Show it to counsel.

MR. BENDER: Thank you, Mr. Ryan.

MR. RYAN: I'll offer it in evidence.

MR. BENDER: Oh, I object to that. I think if the witness --

THE COURT: May I see it, please?

MR. RYAN: Surely.

MR. BENDER: The witness can --

THE COURT: No argument. If you want argument, I'll excuse the Jury.

MR. BENDER: No, thank you, your Honor.

THE COURT: The Jury may be excused for a few moments.

(Jury excused.)

(The following occurred in the absence of the Jury.)

THE COURT: I find no difficulty in finding that the letter is admissible on any number of grounds. I'm just thinking of the subject matter.

First of all, it's a letter sent in the regula

course of business, Mr. Wolfsont's business.

Secondly, it may be subject to a finding by the Jury that Mr. Wolfsont was an agent of the defendant then in conceded authority to write the letter. But I don't know, first, the effect of the handwriting. That should not be in because this was apparently inscribed by Mr. Greshin.

THE WITNESS: That's correct, your Honor. Both -- in both places.

THE COURT: Yes.

Now, the other objection that I would listen to is whether the other substance might be prejudicial, rather, the subject matter of the other letter, charging a one per cent mortgage placement fee.

Now, I know that that is common but the Jury may not like it.

MR. BENDER: That's right.

THE COURT: And closing expenses. They may appear to be charges that the builder might be pocketing in the framework of this case.

I say, the only reason for offering the letter is that one sentence which says, of course, any and all extras ordered by Mr. and Mrs. Walsh have to be paid for prior to the title closing.

MR. RYAN: That's the purpose of the offer.

THE WITNESS: Your Honor, the charges are in the contract. They are not additional charges. They are provided in People's Exhibit 121.

MR. RYAN: I know. Please, Mr. Greshin.

THE COURT: I see nothing in the letter that directs the check be paid to Mr. Hornberger.

MR. RYAN: We'll get to that at the closing.

THE COURT: What is the need to show that he was asked to pay for the extras before? Is that to show it went to a separate pocket?

MR. RYAN: That will be the pattern.

THE COURT: A pattern? On for that reason?

MR. WOLFSONT: As against counsel?

THE COURT: Let me say this.

There are two lawyers. I usually only allow one to try the case. I listen to objections from one lawyer. If you have an objection, you'll have to make it through Mr. Bender. If you want to make all the objections, you can and I'll ask Mr. Bender to make them through you.

MR. BENDER: Your Honor, I have no objection to have Mr. Greshin testify to the one area that Mr. Ryan wanted to establish, namely, that he had been requested to have his client pay the extras before

the closing.

I think that the witness is here, so he can testify. If he has any problem about refreshing his recollection, he can from the document.

I see no need to put in the whole document for that reason.

THE COURT: I won't allow the whole document to go in only because it might very well be prejudicial but I think it is irrelevant, except this may have some bearing:

"Of course, any and all extras ordered by Mr. and Mrs. Walsh will have to be paid for prior to title closing."

MR. BENDER: He can testify to that.

THE COURT: No.

MR. BENDER: I have no objection to that.

THE COURT: He can testify that he received this letter and --

MR. RYAN: Among other things.

THE COURT: I say I'm just talking about this letter.

MR. BENDER: That's okay.

THE COURT: I'll excise everything else, unless Mr. Ryan agrees, that he'll take his testimony, that

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the letter says and only the last line to be included.

MR. RYAN: That's it.

MR. BENDER: Then we have no objection.

THE COURT: Do it that way because the rest of the letter may very well be prejudicial -- may seem like a method of getting extra cash into the lockets of the builder.

MR. RYAN: Fine. We're ready to proceed.

Oh, Mr. -- one question.

Mr. Bender asked off the record whether this witness had signed an informer's agreement as a result of this complaint.

BY MR. RYAN:

Q Did you ever sign an informer's agreement?

A What is an informer's agreement?

MR. BENDER: When you -- can I ask?

THE COURT: Where you get a reward, like 10 per cent.

fols.

(Continued on next page.)

MR. BENDER: Up to 10 percent.

THE COURT: How much?

MR. BENDER: Up to 10 percent.

THE COURT: Up to 10 percent.

THE WITNESS: An agreement, no. I sent a request for a reward, to the government, sometime this winter or spring.

THE COURT: The point is, the defendant is entitled to know whether you hope for a reward.

THE WITNESS: I do, indeed.

THE COURT: All right, that is the answer. I thought that was the reason that defendants usually like information that a complaint was made.

MR. BENDER: Yes.

THE COURT: All right.

MR. BENDER: Normally I would. But --

THE COURT: You have the story.

MR. RYAN: Do you want me to --

THE COURT: No. Let him bring it out. That's cross-examination.

MR. BENDER: I would love to see - no. He wants to see if he could give me the document that he signed.

THE COURT: Oh. You may proceed, Mr. Ryan.

That's cross-examination. It will be available to the defendant before cross-examination. See that it's in Mr. Bender's hands.

Do you have a copy of it, incidentally?

THE WITNESS: What is that?

THE COURT: The letter that you sent?

THE WITNESS: Tip off letter?

THE COURT: Reporting the facts that you intend to get the reward?

THE WITNESS: No.

THECOURT: No?

THE WITNESS: No. It's a document.

THE COURT: A telephone --

THE WITNESS: It's some sort of government form. I don't kno w the name of it or the number of it.

THE COURT: All right.

MR. BENDER: I'm familiar with it.

THE COURT: All right. Seat the jury.

(Jury present.)

THE COURT: You may proceed, Mr. Ryan.

DIRECT EXAMINATION

BY MR. RYAN: (Cont.)

Q Now, the date of contract is -- as you've seen

from exhibit 121, is September 8th, '67. The date of closing was what?

A January 31, '68.

Q All right. You were about to tell us that government's exhibit 122, a letter, was received in connection with extras; yes or no?

A Yes.

Q All right. What was the date of the letter that you received?

A January 4, 1968.

Q What reference is there in that document to extras?

A Shall I read it?

Q Yes. Just that sentence.

A All right. The last paragraph says, "Of course, any and all extras ordered by Mr. and Mrs. Walsh shall have to be paid for prior to title closing."

Q All right. Now, where was this closing held again?

A At a bank. I don't know the address of it.

Q All right. Who was present?

A A title closer. You are referring to the closing with Story Book now?

Q Absolutely.

A All right. A title closer named J. Winston, an attorney for the bank whose name escapes me for the moment. I think Garfinkle but I'm not sure. Mr. Wolfsont, Mr. Hornberger and Mr. and Mrs. Walsh and myself. There may have been others present but those are the ones who I have noted.

THE COURT: Title closer?

THE WITNESS: The title closer Winston.

THE COURT: Oh.

Q Fine. Now, can you tell us the manner of payment by your client, Mr. Walsh, at the closing?

A The Walshes paid everything by certified check, with the exception of approximately $800, which they paid by ordinary check.

Q Excuse me. Paid to whom? The certified checks and the personal checks, whom were they paid to?

A All except one check was paid to Story Book Homes. The seller on the contract of September 8th.

Q Okay. What did the other check involve?

A The other check was for extras, to be constructed in the house but not part of the model house and not part of the model house price.

Q How much was involved with that check?

A $1,931.

Q Now, in what manner was that money paid?

A That money was a certified check, drawn on an attorney's account, as part of the sales price of the Walsh's home.

Q In Levittown?

A A In Levittown, and it was made to Mr. and Mrs. Walsh -- pardon me -- it was made to Mr. DeLeonardis, the attorney for the purchaser and made to the Walshes and then endorsed.

Q To whom?

A Elmer Hornberger.

Q All right. Was there any discussion about that check, prior to its issuance? At the closing?

A You don't mean "issuance" perhaps? Do you mean "delivery"?

Q Delivery, if you'd like?

A All right. I was asked to have the $1,931 check for extras endorsed to Mr. Hornberger. I turned to --

Q Who asked you?

A I don't recall. It would probably have been Mr. Wolfsont.

MR. BENDER: I object; move to strike.

THE COURT: You cannot speculate. Can you give us your best recollection?

THE WITNESS: My best recollection is, it would be Mr. Wolfsont.

Q All right. He asked you that? Then what response, if any, did you give?

A I was puzzled, so I asked him why it would be endorsed to Mr. Hornberger instead of Story Book Homes, since the contract was with Story Book Homes, and I so told him .

Q All right. What response, if any, did you receive?

MR. BENDER: Excuse me, your Honor. May we inquire whether this conversation was in the presence of Mr. Hornberger?

THE COURT: The circumstances are that this was at the closing. The witness has already identified the people there.

I will allow you to answer the question. The rest is for cross-examination.

MR. BENDER: Thank you, your Honor.

MR. RYAN: I'm sorry.

THE COURT: What was the conversation?

Q All right. We left off with one point. I'd like you to pick it up.

A I asked why the check had been made, was to be

made to Mr. Hornberger, since the contract was with his building corporation. I don't remember the response verbatim, but the answer was a soft answer, something like "Never mind," or "Don't worry." I can't recall the exact words.

MR. BENDER: Then I move to strike out the —

THE COURT: Motion denied.

It was something like that?

THE WITNESS: Yes.

THE COURT: Is that what you are saying?

THE WITNESS: Yes.

Q That's your best recollection?

A That's my best recollection.

Q Was there any further discussion about payment of these extras?

A Yes. I was genuinely puzzled.

THE COURT: No. Strike it out.

Q Don't give us your state of mind.

A There was a further discussion. I repeated substantially the same question.

Q Well, tell us what you mean by repeating substantially the same question?

A I said "Really, why do you want the check made to Mr. Hornberger and not to the -- to Stony Brook or Story Book Homes?"

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Q And what response did you receive to that?

A I got a second answer that was not responsive.

Q Tell us what you recall, what your best recollection is.

A My best recollection was substantially the same thing. Don't worry about it, never mind, it won't do any harm.

Q Who said that, to the best of your recollection?

A Mr. Wolfsont.

Q Was Mr. Hornberger present at this time?

A Yes, he was sitting side by side with Mr. Wolfsont.

Q Was there any further discussion prior to the delivery of this check for extras?

A I repeated my question for the third time and at this time I got a somewhat peremptory answer telling me to get on with it, I think from Mr. Hornberger.

Q All right.

As a lawyer representing Mr. Walsh at the closing, can you tell us why you pressed these questions?

MR. BENDER: I object.

THE COURT: Objection sustained.

Q What was eventually done after this discussion about delivery of the check for extras?

A The check was endorsed to Mr. Hornberger and

delivered to him.

Q Did title close?

A Title closed, the Walshes owned the house.

Q Was there any further discussion about extras?

A None that I can remember.

MR. RYAN: Thank you.

No further questions.

MR. BENDER: Could I --

THE COURT: Do you want a recess on this or do you wish to proceed?

Are you prepared to examine?

MR. BENDER: I think so, your Honor.

Can I just have two seconds, your Honor?

Can I see the contract?

THE WITNESS: Your Honor, this exhibit, do I have to surrender it?

THE COURT: Oh, yes, it is marked.

It will be returned to you.

MR. RYAN: Would you be good enough to mark these four documents?

THE COURT: We will take a brief recess at this time, then we will have the cross-examination.

The jury may be excused.

(The jury left the courtroom.)

THE COURT: Will you please mark the exhibits. Have you turned over all the 3500 material?

MR. RYAN: Yes, your Honor.

THE COURT: Do you have the form that Mr. Greshin referred to, the form which would make him eligible for a fee in the event of recovery? Please mark it and turn it over to Mr. Bender.

THE CLERK: Eight-page document marked as Government's Exhibit 123 for identification.

THE COURT: Do you have in your file anything concerning the request for the reward?

MR. RYAN: Correct, and I think that Mr. Bender-

THE WITNESS: There is something else.

THE COURT: Talk it over with Mr. Ryan.

THE WITNESS: That is something Mr. Ryan doesn't have.

MR. RYAN: We will try to find it.

THE COURT: Mr. Bender, you may proceed.

MR. RYAN: Pursuant to counsel's request, I would like to mark this document dated February 1, 1966, consisting of three pages.

THE CLERK: So marked as Government's Exhibit 124 for identification.

MR. BENDER: Thank you very much.

Greshin-cross

CROSS-EXAMINATION

BY MR. BENDER:

Q Mr. Greshin, with respect to the extras that your client had contracted for, you reflected the amounts that he paid for them specifically in the closing statement that you drew for him; is that correct?

A No, I reflected the sum total, not the breakdown.

Q I will ask you the question again.

Did you reflect the amount of money that you gave him or that your client gave him for extras in your closing statement?

A Yes.

Q And that was listed specifically as extras for house as agreed, $1,931?

A Yes.

Q And as a matter of fact you also included, did you not, in the contract of sale when your client purchased or entered into the contract to buy the property the extras that he had ordered?

A The contract covered specifically some of the extras, but they were not part of the contract price.

Q Well, do you remember how much was specifically listed in the contract that were ordered by your client, roughly of the dollar amount of the $1,900?

Greshin-cross

A $1,330, give or take.

Q Was this for extra cabinets that he had ordered of which the price had not been determined?

A I don't remember that, I do know there was --

Q Excuse me, excuse me.

MR. RYAN: Just a moment, the witness hasn't finished.

Q I show you 121 in evidence, which the Government has marked in evidence as the contract entered into. Would you take a look at that and see if you haven't extras listed in the contract with a specific dollar amount, with the exception I think of the cabinets; am I right?

A There are four items of extras that are specifically priced.

Q And that would be what, $1,340?

A $1,330, sir.

Q So then the difference -- there is a difference and then there is the category of cabinets without a price mentioned.

A There is a reference to the purchase right to select cabinets at additional cost without a statement of what the additional cost would be.

Q So that the $1,931 that was paid at the closing, less the $1,330, the difference would be the cabinets?

A I couldn't possibly tell you now.

Q But in any event -- withdrawn.

Now, as a result of your conversations that you had with Mr. Wolfsont about which you had testified on your direct examination, you wrote a letter to the Internal Revenue Service; did you not?

A Yes --

Q And --

A -- (continuing) a conversation with Mr. Wolfsont and Mr. Hornberger.

Q Yes, and we are talking about the closing; are we not?

A Yes.

Q And you wrote a letter to the Internal Revenue Service complaining about the proceeding wherein the request was made of your client to pay the extras to Mr. Hornberger personally; isn't that right?

A I wouldn't --

Q Yes or no, sir.

THE COURT: If you cannot answer it yes or no, say so.

A To that question the answer is no.

Q You did refer specifically to the fact that you had been asked to make payable by check for extras that

were done by the corporation to Mr. Hornberger personally?

A I brought that fact to the attention of the Internal Revenue Service, yes.

Q And you subsequently entered into an arrangement with them that you would be paid a reward as an informant's fee in the event any civil taxes were collected from Mr. Hornberger's corporations by the Government; isn't that right?

A I did not enter into an arrangement.

Q Did you sign an agreement called an informant's agreement indicating that the information that you had supplied, in the event there were any additional taxes found to be due and owing, you would receive, according to a section, up to 10 percent?

A I don't know that the document is called an informer's agreement, I haven't seen the document since I signed it.

I think it would be sufficient to say that I made a claim for a reward if recovery were elicited by the Government and that the claim was made withint the past six months, as I can best recall it.

(Continued next page)

Greshin-cross

Q Do you recall from and after the date of the closing that you testified to that you made your initial complaint to Internal Revenue Service?

A I don't understand that question.

Q How long after the closing in 19 -- when was it, October 1968, did you say?

A January --

Q Did you make --

A January 1, 1968.

Q When did you make your complaint to the Internal Revenue Service and seek this -- in other words, in regard to the complaint, when did you make it?

A I made the complaint about a year after the closing in 1969, I made the request for a return for reward in 1974.

Q So you waited a whole year; did you not?

A A little more than a year.

MR. RYAN: For what?

MR. BENDER: Before he made --

THE COURT: No, no questions by co-counsel (sic) or the adversary, you just make your objection.

MR. BENDER: I will withdraw the last question.

MR. RYAN: I will withdraw the objection.

MR. BENDER: Okay, I didn't know you made an

objection, but all right.

Q Did you -- it was -- it was the year after the contract was closed, and that is this contract we are talking about; is it not, 121 in evidence?

A It was more than a year after the contract closed.

Q You mean it was a year from the date of closing?

A More than a year from the date of the closing.

Q How much, a year and a half?

A No, about a year and a month.

MR. BENDER: I would like the Government to produce the reward, the informer's reward that this gentleman signed.

MR. RYAN: We don't have it here in Court. You just asked, but we have a form that we believe was the same kind of form.

MR. BENDER: No, no, no, I will object to that statement.

THE COURT: Show it to the witness.

MR. BENDER: I don't think Mr. Ryan can make a statement.

THE COURT: Strike that statement out, the jury will disregard it.

Greshin-cross

The Government doesn't have the form.

MR. RYAN: We have the form but not the one that was executed by the defendant --

THE COURT: They say they don't have the form in Court.

THE WITNESS: By the witness.

MR. RYAN: Witness, I meant witness.

THE COURT: Now one at a time.

Only the lawyers have the right to ask questions and make objections, no one else.

Next question, Mr. Bender.

BY MR. BENDER:

Q You said it was more than a year after the closing. You have established the closing when, January 1968, would you say?

A January 31st.

Q Now, how long after did you make the complaint to Internal Revenue Service?

A In March of '69.

MR. BENDER: I have no further questions.

REDIRECT EXAMINATION

BY MR. RYAN:

Q Did you have any dealings with Mr. Hornberger between the time of the closing and the time of the complaint

which was over a year later?

A No, not to my recollection, not at all.

Q Did you have any adverse experiences with him or with anybody else in connection with this matter?

A Not that I can recall at all.

Q What was your state of mind when you wrote the complaint and how did it come about?

A Well, frankly --

THE COURT: Well now, I don't know that you heard that question.

THE WITNESS: I thought I did, Judge.

THE COURT: I'm talking to Mr. Bender.

Did you hear the question?

MR. BENDER: No, I'm sorry.

THE COURT: Would you like to hear it?

MR. BENDER: I would appreciate it.

THE COURT: Mr. Karr?

(Previous question read.)

MR. BENDER: Well, I object.

THE COURT: Objection sustained.

MR. RYAN: Thank you.

THE COURT: Anything further?

MR. RYAN: No, your Honor.

THE COURT: You may step down.

Rizzi-direct

(The witness was excused.)

THE COURT: Next witness.

MR. RYAN: Mr. Rizzi.

R I C H A R D J . R I Z Z I , called as a witness in behalf of the Government, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. RYAN:

Q Mr. Rizzi, tell us your occupation, sir.

A Divisional sales manager for Sears Roebuck.

Q Where do you presently reside?

A 6 King Arthur Court, East Sawtucket, Long Island.

Q How long have you resided there?

A August 1968.

Q Did you have that house built?

A Yes, sir.

Q When did you sign a contract to have the house built?

A October 17, 1967.

Q And with whom did you contract to have that house built?

A Story Book Homes.

Q Did you order any extra construction to be

done or any extras of any kind in connection with the construction of that house?

A Yes.

Q What extras did you order to be done?

A We had an extra parcel of land, we had painting done versus wallpaper, we had double thick insulation throughout the house.

Q When did you order these extras?

A At the contract signing.

Q And with whom did you discuss the ordering of the extras?

A With the builder.

Q Who was that?

A Mr. Hornberger.

Q Was there any discussion about payment for the extras: yes or no?

A No.

Q Not at that time?

A Not at that time.

Q All right.

Did there come a time when you made payment for extras?

A Yes, sir.

Q When was that?

Rizzi-direct

A In April of 1968.

Q And how did it come about that you made a payment in April?

A I received a letter from Mr. Hornberger's office outlining the extras and what was due, the amount that was due.

Q And after receiving that letter, what did you do?

A I had called because the amount of extras were $2,110 and I didn't have the entire amount, all I had was $1,500 and I said I would mail the $1,500 in right away and the balance to follow, and which he agreed to.

Q Well, the total amount of extras was how much?

A $2,110.

Q I show you Government's Exhibit 64A, it is in evidence.

Will you look at that, sir.

It is a letter?

A Yes.

Q Do you recognize the document?

A Yes, sir.

Q What is it?

A It is a letter Mr. Hornberger sent to me.

Q Is that the first letter you received?

A Right.

Q All right.

What is the date of it?

A March 27, 1968.

Q After receiving that letter, what did you do?

A I phoned his office telling him again there was an error in the addition and I didn't have the entire $2,110, that I would mail him $1,500 and mail the balance following, and --

Q All right.

Did you thereafter mail $1,500 to Mr. Hornberger

A Yes, I did.

Q How?

A I made a check payable to the corporation for $1,500.

Q Do you have the check with you?

A Yes, I do.

Q May I have it?

(Document handed to Mr. Ryan.)

MR. RYAN: Will you please mark this document.

THE CLERK: Check dated April 1, 1968 and attached advice, marked for identification as Government's Exhibit 125.

THE COURT: Is it being offered?

MR. RYAN: Yes, sir.

THE COURT: Any objection?

MR. BENDER: No, no objection, your Honor.

THE COURT: Let it be marked.

THE CLERK: Government's Exhibit 125 previously marked for identification now marked in evidence.

BY MR. RYAN:

Q After you mailed this check for $1,500, what happened, if anything?

A I received a phone call from Mr. Hornberger kind of bawling me out for not following the instructions in the letter.

Q What did he tell you to do, to the best of your recollection?

A That he wanted a check made out to himself personally.

Q Well, what else was discussed in that regard, if anything? We would like you to state to the best of your recollection everything that was said about that payment?

A Well, I apologized and I told him to send the check back to me and I would send him a new one.

Q Is there anything else that you can recall that was within that conversation with Mr. Hornberger?

A Well, he sounded like a little bit abusive

and annoyed --

THE COURT: Strike that out.

Just what was said, not how it was said.

A I don't recall exactly what was said.

Q So did you receive back the $1500 check?

A Yes, I did.

Q All right.

Thereafter did you make any further -- any payment for extras?

A When I received -- when I finished with the conversation with Mr. Hornberger I immediately stopped payment on the check and I notified my lawyer, and he said it was perfectly all right to make it out to him, so when I received it back I went back and I made up the entire amount for $2,110 to Mr. Hornberger.

Q I show you Government's Exhibit 64, it is in evidence.

Do you recognize that document?

A Yes, I do.

(Continued next page)

EK:bd
3 PM 3

Q What is it?

A It is my check to Mr. Hornberger for $2,110.

Q I show you Government's Exhibit 64B.

Do you recognize it? It is in evidence, do you recognize that document?

A I do.

Q What is it?

A It is my letter of apology to Mr. Hornberger for making a mistake on the check.

Q Is it the covering letter that was sent with the check; is that it?

A Yes, sir, right.

Q All right.

MR. BENDER: Is that letter in evidence?

MR. RYAN: Yes, it is.

MR. BENDER: I would ask that that be stricken, your Honor, this is one of the letters that was marked beforehand, we haven't had a chance to sit down because --

THE COURt: May I see the letter you are objecting to?

MR. BENDER: It's testimony would be --

THE COURT: No, give me the check and the letter that you objected to.

This one (indicating)?

MR. BENDER: Yes, your Honor.

THE COURT: Was this marked at the pre-trial?

MR. RYAN: It was.

MR. BENDER: Apparently, your Honor, yes.

THE CLERK: It was, your Honor.

THE COURT: Exhibit 64B is stricken.

MR. BENDER: Thank you.

THE COURT: Self-serving.

BY MR. RYAN:

Q I show you Exhibit 64C.

Would you look at that document, it is in evidence.

Do you recognize it?

A Yes, sir.

Q What is it?

A It is a letter to me thanking me for my letter of April 1st and enclosing my check for $2,110.

MR. RYAN: Now, at this time, your Honor, I would like to show the jury these documents, and I have no further questions.

THE COURT: Show Mr. Bend[illegible] you are showing the jury and see if there is any objection.

Do you agree that all of these exhibits are in evidence?

MR. RYAN: They are.

THE COURT: All right. Show them to the jury. Call out the exhibits that are being shown to the jury, please.

THE CLERK: 64 in evidence, 64A in evidence, 64C in evidence and 125 in evidence, four exhibits all told.

THE COURT: Give them all to the foreman and have him pass each of the exhibits along, to juror No. 2 and so on, and then through the back to Juror No. 7.

Any cross-examination, Mr. Bender?

Are you ready for cross-examination, Mr. Bender?

MR. BENDER: Yes, your Honor, whenever you are ready, your Honor. I thought the jurors were just looking at the exhibits, I'm sorry.

THE COURT: Oh, well, you can proceed.

MR. BENDER: Oh, I'm sorry, your Honor.

CROSS-EXAMINATION

BY MR. BENDER:

Q Mr. Rizzi, the extras about which you testified which you had ordered, were they made a part of your contract when you agreed to buy the house?

A Yes, yes, they were.

Q They were all listed in the contract; were they not?

A Yes, I believe so.

Q You then issued a check, did you not, at the request of one of the corporations; do you recall that? That is to pay, to pay the extras to Mr. Hornberger.

A Yes, sir.

Q But that you say you issued a check to the corporation?

A I'm not sure I understand what you are talking about.

Q Do you have a copy of your contract with you?

A Yes.

THE COURT: Is it marked as an exhibit?

MR. BENDER: Yes.

THE COURT: Is the Rizzi contract marked as an exhibit?

MR. BENDER: No, I don't think so, your Honor.

THE COURT: Just mark it now, then .

MR. BENDER: Thank you very much.

May we just mark this for identification.

THE CLERK: Contract marked as Government's Exhibit 126 for identification.

MR. BENDER: That would be defendant's exhibit A.

THE COURT: Yes, Defendant's Exhibit A for identification.

THE CLERK: So marked.

(Contract marked as Defendant's Exhibit A for identification.)

BY MR. BENDER:

Q Now, this contract that you refer to, which is Defendant's Exhibit A for identification, was made -- was to purchase a house from Story Book Manor; is that correct?

A Yes, sir.

Q I notice the check that you first showed us, the $1500 check, that was made out to Story Book Homes; was it not?

A Yes, sir, the letterhead, the letterhead that I received asking for the payment was on Story Book Homes, so I just copied it off the top.

MR. BENDER: May I have those letters, Mr. Ryan?

MR. RYAN: The jury has them.

(The documents were then retrieved from the jury.)

MR. RYAN: I have copies if you want them.

BY MR. BENDER:

Q Now this check, which is Government's Exhibit 125, was your part payment on the extras which you had ordered according to the contract?

A Right.

Q And this letter, Exhibit 64, is a letter from Story Book Manor, is it not, dated April 12, with the initials on the bottom of this letter "E.E.H.", and asking you to enclose your check in the amount of $2,100 for payment on the extras; is that correct?

A No, the letter I have is Story Book Homes.

Q May I show you this letter (indicating)?

A No, this is the letter I got (indicating).

THE COURT: That is the letter you received?

THE WITNESS: Yes, that is the first letter I got.

THE COURT: Mark that as an exhibit.

That will be a defendant's exhibit.

THE CLERK: DEfendant's Exhibit B, so marked, dated March 27, 1968, for identification.

BY MR. BENDER:

Q This letter, Defendant's Exhibit B for identification, is the original letter that you received?

A Yes.

Q And that letter is on the stationery of Story Book Homes, Inc.?

A Yes, sir.

Q And that asked you to forward a check to Mr. Hornberger for the following orders you ordered in the sum of $2,110, roughly?

A Yes.

Q Is that right?

A Yes, sir.

Q Actually it was $2,210, and this was an error; isn't that right?

A Yes, sir.

Q You then sent a check for $1,500, you said?

A Yes, sir.

Q Now did that come back marked "insufficient funds"?

A No, sir, I had called the office because I did not have the entire $2,110 --

Q I'm talking about this check, Exhibit 125.

A Right, this check was in payment of this letter.

Q But did you have insufficient funds?

A Yes, to cover that check, I had enough.

Q That debit note is from the bank?

A Yes.

Q Did you stop payment on the check?

A Yes, I did.

Q Did you stop payment on the check after you had your conversation with Mr. Hornberger?

A Yes, sir.

Q And that was when Mr. Hornberger told you to issue your check for $2,110 to him personally rather than to the corporation?

A Yes, sir.

Q Is that right?

A Yes, sir.

(continued next page)

Q Now, on April 12, 1968, you received a letter from Story Book Manor, Inc. acknowledging receipt of your check for the extras and that is a letter which is signed by the Corporation and Elmer E. Hornberger; is that correct?

A Yes, sir.

Q The check that you issued for the $2,100.00, did you indicate anything on that check to note the fact that you were paying for the extras as I believe I had it on the back of the check.

Q Do you have the check here?

A I have the original check.

MR. BENDER: Has that been placed into evidence?

MR. RYAN: No, it hasn't.

No objection.

THE COURT: Any objection?

MR. RYAN: None.

MR. BENDER: May we at the same time put the contract into evidence?

MR. RYAN: No objection.

THE CLERK: That's defendant's. Defendant's Exhibit A, previously marked for identification, is now marked in evidence.

Check marked defendant's Exhibit C in evidence.

MR. BENDER: That was a check -- a copy which has been marked into evidence as 64-E, your Honor.

Is there any way we are going to keep this straight?

THE COURT: The record will show that the original is C and the copy was previously marked 64-E.

MR. BENDER: No further questions.

MR. RYAN: May I have the contract please?

(Document handed to counsel.)

REDIRECT EXAMINATION.

BY MR. RYAN:

Q You contracted to have this house built with Story Book Manor shown in Defendant's Exhibit A?

A Yes.

Q Sir, you received a letter with respect to extras from Story Book Homes?

A Yes, sir.

Q And thereafter you wrote out $1,500.00 to Story Book Homes?

A Yes.

Q Is there any reason other than the fact that you received the letterhead from Story Book Homes that you wrote it out to the Homes Corporation?

A Yes, I read the letter and it showed it was to be payed to Mr. Hornberger. I didn't think it was right of my own opinion and I made it out to Story Book --

MR. BENDER: Objection.

THE COURT: Strike out as to his opinion.

Q Did you have any conversation with anybody for the extras paid to the Homes, Manor or any other corporation?

A No.

MR. RYAN: No further questions.

THE COURT: Anything further?

MR. BENDER: Yes.

RECROSS EXAMINATION

BY MR. BENDER:

Q As far as your payment for the extras were concerned, you wanted some record that you had paid for the extras, did you not?

A Yes.

Q And it didn't actually make any difference to you whether it was paid to Mr. Hornberger or the corporation as long as you had a record that you paid for extras; is that correct?

A Yes, sir.

MR. BENDER: No further questions.

THE COURT: Anything further?

MR. RYAN: Nothing.

THE COURT: You may step down. Next witness.

Suppose you leave everything marked in evidence with Mr. Ryan.

I'd like all the documents obtained from this

witness's possession to be kept by you and you are responsible for them Mr. Bender.

Would you please come forward.

MR. RYAN: Mr. Kmetz.

S T E P H E N J. K M E T Z, J R., having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: State your full name, please.

THE WITNESS: Stephen J. Kmetz, Jr.

DIRECT EXAMINATION

BY MR. RYAN:

Q Mr. Kmetz --

A Yes, sir.

Q -- Where is it that you reside presently?

A 19 Galahad Lane, Wesconsett (phonetic).

Q How long have you lived in that house?

A Exactly seven years and one day counting today.

Q Did you have that house built?

A Yes.

Q Did you contract to have the house built?

A Yes.

Q With what corporation -- with whom did you contract to have that house built?

A Well, at the time we stopped at the model house, it was called Story Book Homes. It was Hornberger Enterprises.

Q Do you have the contract?

A No, I don't have the contract. I couldn't find the contract. I have the deed to the property.

Q Now, in connection with building this house, did you order any extra work to be done?

A Yes, I did.

Q What extra work did you order and when did you order it?

A Well, prior to -- I guess, at the contract, I got together with Mr. Hornberger and told him what different extras I wanted in the house.

Q Will you tell us what extras you told him you wanted?

A I will have to refresh my memory. It will just take a second.

It was a dishwasher, $265.00 -- do you want me to give the costs?

Q Just read off the extras.

A A 220 line for the dryer , a stainless steel sink, louvre doors between laundry room and kitchen, dryer stored in cellar of Story Book cottage -- I purchased a dryer that he had in his cottage. Patio and sidewalk from the front to the rear of the house, light over kitchen sink with switch, recessed outlet for clock, basement three outlets. Outlet

outside front stoop, outlet outside back door, outside fixture over two-car garage and vanity in one of the bathrooms. PC-7 self-cleaning oven. There might have been some extras -- other extras, but right now -- let me see. The corner lot was an extra item plus extra thick insulation was an extra item and shingles was extra. The towel in the two bathrooms was extra. I think that's about it.

Q All right.

At the time you ordered the extras with Mr. Hornberger, did you have any conversation with him about payment? Yes or no.

A Yes.

Q What was the conversation that you had with him about payment?

A That I was to make payments on all these extras before we go to closing.

Q Now, there came a time when you closed I take it?

A Yes.

Q Do you happen to have the date?

A June 22, 1967.

Q Prior to the closing, did you make any payment for these extras?

A On the items that came to $2,200.00 I did.

Q Okay.

Where did you make the payment?

A In the model house on Nesconsett (phonetic) Highway, Story Book Homes, in the office.

Q To whom?

A Mr. Hornberger.

Q What conversation took place when you made the payment?

A Mr. Hornberger ran up this tape on his adding machine -- which I requested -- and thereupon I drew a check to his name.

Q Was there any conversation about drawing the check--

A No.

Q To his name?

A No discussion. I asked him how he wanted it made and he said "Make it to me."

Q This is the slip that Mr. Hornberger prepared for you?

A Right.

MR. RYAN: Mark it as the next exhibit, please.

THE CLERK: Tape so marked Government's Exhibit 126 for identification.

MR. RYAN: I offer it into evidence.

THE COURT: Any objection?

MR. BENDER: I didn't see it.

(Document shown to counsel.)

MR. BENDER: No objection.

THE COURT: Let it be marked.

THE CLERK: Government's Exhibit 126 marked for identification now marked in evidence.

(So marked.)

Q I show you what has been marked as 38 in evidence, a check dated June 22, 1967. Would you look at that, do you recognize that check?

A That's my check.

Q For how much?

A $2,200.00.

Q And that's in payment for the items that you have shown in Exhibit 126?

A Right.

Q Did you make any further payments for extras?

A There was one more payment that I made after I moved into the house. I had a patio put in and that's that walk from the side of the house to the patio. It wasn't done until after I moved in sometime in July.

Q Did you make payment?

A Yes, I gave it to Mr. Hornberger. He was in my house on that date.

Q Came to your house?

A Yes.

Q What discussion was there before you made out the check?

A Well, he came with a tape measure to measure the actual footage of sidewalk laid down and he told me so much per square foot and at that time asked for the check which I probably wrote out in his name.

Q Would you look at Exhibit 28 in evidence -- look at the check and see if you recognize it.

A It's my writing and it is my check.

Q How much?

A $450.00.

Q Payable to?

A Elmer E. Hornberger.

I told me to write me a little receipt which he did in his handwriting.

MR. RYAN: Please mark this as the next exhibit, 126-A.

THE CLERK: Document so marked, Government's Exhibit 126-A for identification.

MR. RYAN: I offer it into evidence.

(Document shown to counsel.)

MR. BENDER: No objection.

THE COURT: Let it be marked.

THE CLERK: Government's Exhibit 126-A, previously

marked for identification, now marked in evidence.

MR. RYAN: No further questions.

(Continued on next page.)

HS:ss
4pm2

CROSS-EXAMINATION

BY MR. BENDER:

Q Mr. Kmetz, , after you ordered the extras -- by the way, from whom did you order the extras?

A Well, from Mr. Hornberger or one of his -- I think it was Mr. Hornberger

Q You dealt also with a salesman, did you not?

A I don't remember his name.

Q But do you remember whether it was Mr. Hornberger or a salesman with whom you discussed the question of the extras?

A Some of these extras I discussed with Mr. Hornberger. It is 7 years, I just can't quite recollect.

Q It is quite possible that you did discuss---

A Possible.

Q -- and ordered your extras from the salesman?

A That's possible.

Q After you did order the extras, you received a letter from Horn Enterprises Incorporated, did you not, asking you to sign an acceptance for the various extras which were listed on that letter to you --

A Yes.

Q -- is that right?

A Yes.

Q Do you have the original letter there?

A I got letters here. Let's see. Here are some. These are my copies.

(Shown to counsel.)

MR. BENDER: May we mark this as one defendant's exhibit.

THE CLERK: Three copies of letters marked defendant's exhibit D for identification.

(So marked.)

Q These are copies you say of the originals that you received?

A Yes -- apparently so. I kept a copy.

Q And there is one letter dated April 19th, 1967?

A And one April 12th --

Q The one April 12th, 1967 --

A April 12th, yes.

Q -- list the extras, does it not?

A YEs.

Q And this does not ask you to pay for the extras directly in any way shape or form?

A IT does not, no.

Q The letter of aApril 18th, 1967 also indicates additional extras; is that right?

A Yes.

Q And that was the letter from Horn Enterprises Incorporated?

A Wait a minute -- Horn Enterprises, right.

Q Do you recall whether that was signed also by Mr. Hornberger or at least his name appeared?

A His name appeared in typewritten --

Q Then did you receive the third letter from Horn Enterprises asking you to sign and accept some additional extras;is that right?

A Correct.

Q Do you recall if you received any letter acknowledging receipt of the payment of the extras?

A Apparently not, because in all my files I went through I couldn't come up with any acknowledgement. The only acknowledgement I got was when I put down $2,000 when the frame of my house was done and then I got an acknowledgement after that.

Q Did you get a receipt from Mr. Hornberger when you gave him the $2,200?

A A receipt -- the only receipt I got was actually this (indicating).

Q You mean the tape which listed in his handwriting amounts adding up to $2,200?

A Yes.

Q And then you got a receipt from him?

A This is the only receipt.

Q For the other --

A The $2,000, yes.

Q Did you pay these moneys to him in the office of Horn Enterprises?

A TWhich one do you refer to?

Q The $2,200?

A The $2,200?

Q Yes.

A That was done in his office.

Q Were any of the girls there when you gave him the check?

A I don't recall, but --

Q Did you ask for him specifically?

A He was there when I was there.

Q And you asked for him?

A I asked for him because I dealt with him in the past.

Q Did you pay any advances with regards to the main sales?

A No.

Q Or any time after you entered into the

contract?

A No.

Q Who did you pay your money to at the time of the contract?

A At the contract Mr. Wolfsont's office in Smithtown. My lawyer took care of whatever.

Q Did you make any payments for these extras or any other payments to any of the girls in the office of Mr. Hornberger's corporation?

A I issued two checks in the name of Mr. Hornberger. Both checks I gave to him.

MR. BENDER: Nothing further.

REDIRECT EXAMINATION

BY MR. RYAN:

Q With respect to the other checks you issued arising out of this corporation, who were they payable to?

A Horn Enterprises.

MR. RYAN: Thank you.

THE COURT: Anything further?

MR. BENDER: No.

THE COURT: You may step down.

Call your next witness.

MR. BENDER: Could we put in his original checks for Horn Enterprises?

THE WITNESS: I don't mind. This is the one.

MR. BENDER: Thank you bvery much.

MR. RYAN: No objection.

THE COURT: Please mark it.

MR. BENDER: May we offer these three letters into evidence at the same time?

MR. RYAN: No objection.

The copies are in already.

MR. BENDER: They are copies?

MR. RYAN: 38-A, 38-B and 38-C.

THE COURT: There is a lot of duplicate marking.

MR. BENDER:" I have no objection.

Has the original of the checks been marked?

MR. RYAN: No.

THE COURT: Once an exhibit has been marked, I would appreciate it if the other side not remark another copy. We have got enough markings here as it is.

THE CLERK: Check marked defendant's exhibits F in evidence.

THE COURT: The letters, are they in evidence?

THE CLERK: At the pretrial.

(Continued next page.)

WILLIAM P. CAMPBELL, having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: State your full name.

THE WITNESS: William P. Campbell, C-a-m-p-b-e-l-

DIRECT EXAMINATION

BY MR. RYAN:

Q Mr. Campbell, where do you reside?

A 3 King Arthur Court, East Sautucket, New York.

Q How long have you been there?

A 7 years.

Q Did you have the house built?

A Yes.

Q Did you contract to have it built?

A Yes.

Q When did you contract to have it built?

A In April of 1967.

Q Do you have a copy of the contract with you?

A Yes.

Q May I have it, sir?

A Yes.

(Document handed to counsel.)

MR. RYAN: Would you kindly mark this three-page contract?

THE CLERK: Government's exhibit 127 for identification.

(So marked.)

Q When did you contract tohave the house built?

A In April -- April 4th, 1967.

Q With whom did you contract to have the house built?

A With Story Book Homes.

Q Now, did you order at any time any extra work to be constructed?

A Yes, we did.

Q Pardon me?

A Yes.

Q What extras did you order?

A Well, we had an extra room built on the back of the house where I work out of the house. We had the room built, we had a pocket door put in from the entrance-way into the kitchen, extra wiring done, extra lighting fixtures, extra insulation and some other items. But generally the big item was the extra room.

Q Who did you discuss the extras with?

A With Mr. Pornberger, the builder.

Q Personally?

A Yes.

Q You ordered them; is that right?

A Yes, it is.

Q Can you tell us when with respect to the contract which I believe is dated April 4th --

A Yes.

Q -- did you have the conversation with Mr. Hornberger about extras?

A Oh, prior to April 4th we talked about it.

Q Was there any discussion about payment for extras at that time?

A Not about the payment, about the cost of the extras.

Q Were you given an estimate of the costs?

A Yes.

Q What figure did he give you?

A Well, each item by the job -- there was a cost. For example, the extra room was $2,085.

Q Eventually all of these extras were installed into your house; is that right?

A Right.

Q And there came a time when you closed title?

A Yes.

Q What was the date of the closing?

A October 4th, 1967.

Q Between April 4th, the time of the contract signing, and October 4th, the time of the closing, was there any communication concerning extras with anyone on behalf of Mr. Hornberger or Mr. Hornberger himself?

A Well, Mr. Hornberger sent us a statement as to the total cost of the extras and that the payment was due for the extras prior to the closing.

Q Okay.

Let me show you government's exhibit 41-A and tell us if you recognize that?

A Yes.

Q What is it?

A This is the statement as to the amount of the moneys that we owed Mr. Hornberger for the extras.

Q After receiving that letter, what did you do?

A Well, the first thing we did was to check to see whether or not all the jobs had been done. We checked the house -- naturally we were over at the house to see that the jobs that we contracted for were completed and we saw that they were and we made up this payment for Mr. Hornberger.

Q I show you government's exhibit 41 in evidence. Would you look at it, sir?

A Yes.

(Document shown to witness.)

Q Do you recognize that check?

A Yes.

Q Whatis it?

A That's our check to Mr. Hornberger.

Q Pursuant to --

A For the extras done on our house, right.

Q What's the amount of the check?

A $3,265.

Q That was issued after you received 41-A, the letter?

A Yes.

MR. RYAN: I would like to offer the contract into evidence.

THE COURT: Any objection?

MR. BENDER: No objection.

THE COURT: Let it be marked.

THE CLERK: Government's exhibit 127, previously marked for identification, now marked in evidence.

(So marked.)

MR. RYAN: No further questions.

THE COURT: Mr. Bender?

MR. BENDER: Could I just see the contract, your Honor?

I may just have one question.

(Document shown to counsel.)

CROSS-EXAMINATION

BY MR. BENDER:

Q Mr. Campbell, did I understand you correctly to say that you entered into the contract with Story Book Homes, Incorporated?

A It may be Story Brook Manor.

Q The contract which is in evidence and which — did you mark this 127?

THE CLERK: Correct.

Q -- indicates that the contract is between Story Brook Manor?

A Yes.

Q Does that refresh your recollection as with what corporation you entered into the contract to buy the property -- buy the house and have it built?

A Well, I think there were -- at times there might have been different names used for the corporation. This is Story Brook Manor. I am looking at the closing statement which was prepared by an attorney.

MR. BENDER: Excuse me -- go ahead.

A (Continuing.) He referred to it as Story Book Homes. This is a contract which was Story Brook Manor.

Q May we see the closing statement, please?

A Yes.

(Document shown to counsel.)

MR. BENDER: May we have it marked?

THE CLERK: So marked as defendant's exhibit F for identification.

Q This closing statement was prepared by your own lawyer, was it not?

A Yes.

Q That's Lee Frankel?

A Yes, sir.

MR. BENDER: I will offer it into evidence.

MR. RYAN: No objection.

THE CLERK: Defendant's exhibit F, previously marked for identification, now marked in evidence.

(So marked.)

Q Do you have the correspondence to which you referred, that you say that you received for the payment of the extras?

A Yes, I do.

Q May we have that letter, please?

A Yes.

(Document shown to counsel.)

MR. BENDER: May we have this marked?

MR. RYAN: I think that is another duplication.

MR. BENDER: How about the letter?

MR. RYAN: It's a duplication.

MR. BENDER: May I see it?

THE COURT: The jury may be excused for a few moments.

(Jury leaves the Courtroom.)

THE COURT: What purpose is served by introducing into evidence all these closing statements? It is just going to overwhelm the jury with a lot of figures that have absolutely nothing to do with this case.

One percent origination fee for contract of sale, computation on taxes, fuel oil, insurance premiums. What's the purpose of this?

MR. BENDER: I do not disagree with your Honor. I merely wanted to put it in in view of the fact that it supported the witness' testimony that he thought the house was built by Story Brook Homes, rather than Manor and merely wanted to show the confusion that existed.

THE COURT: What's the difference?

MR. RYAN: That's what I objected to, is the confusion.

THE COURT: There's so many corporations. They get letterheads from one corporation, a contract from another.

Mr. Rizzi made it out to one corporation because the letterhead said one corporation and when he purchased it, another.

This is an income tax fraud case. I will not permit everything that just happens to come into the Courtroom to be introduced into evidence. I think we have got so many documents now that I am concerned about the jury keeping their eye on the issues. Every time a buyer comes in and a lawyer asks a question, I get a document and into evidence it goes.

You do not happen to have your marriage certificate with you?

All right, you're lucky. If you had brought it, it would have gone.

We will take a 5 minute recess and I am going to examine every document. If it is not material -- even though the lawyers want it in -- it will not go in.

(Recess taken.)

(Continued next page.)

Hornberger
5PM gr/nc

(The following occurred in the presence of the jury.)

THE COURT: Do the parties agree that that last document should be stricken?

MR. BENDER: Both.

THE COURT: Yes.

MR. BENDER: Exhibit F and the original check, which is E.

THE COURT: All right.

MR. BENDER: I don't think we need it in, your Honor. I'll withdraw it.

THE COURT: All right.

MR. RYAN: No objection.

MR. BENDER: Okay.

CROSS-EXAMINATION

BY MR. BENDER:

Q Mr. Campbell, the contract which you signed, you and your wife, did it list the extras which you ordered?

A Yes, it did.

Q And when you paid the money, where did you pay it?

A Where did we pay it?

Q Yes.

A At the Story Book Home Site, the office.

Q Whom did you give it to?

A To Mr. Hornberger.

Q And that's the $2200 check?

A 32.

Q $3265.00?

A Right.

MR. BENDER: No further questions.

THE COURT: You may step down.

THE WITNESS: Thank you.

THE COURT: Next witness.

(continued next page.)

VICTORIA COLETTI, called as a witness herein, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RYAN:

Q MR. RYAN: Your Honor, I don't know whether this is an appropriate time to make a statement about the other home owners the Government relies on.

THE COURT: If you and Mr. Bender can --

MR. BENDER: I didn't hear what Mr. Ryan said.

THE COURT: If you can consult in the corner of the courtroom and agree on something, then you can make a statement.

If there is an agreement, then it can come before the jury.

All right. I'd like the defendant to recite the stipulation. Make certain that he understands what the defendant is conceding.

Will you please --

MR. BENDER: I think I would -- with your Honor's permission, like to write something up that

Mr. Ryan can look at and give it to the jury at that time.

THE COURT: All right.

MR. RYAN: Suppose we do that tomorrow. Is that all right?

MR. BENDER: All right, your Honor?

THE COURT: Fine.

DIRECT EXAMINATION

BY MR. RYAN:

Q Mrs. Coletti, will you tell us your occupation?

A I'm a housewife and parttime insurance agent.

Q All right.

Did you ever work for Elmer E. Hornberger?

A Yes.

Q When did you work for him?

A Oh, May of '67. I started working for him.

Q And in what capacity did you work for Mr. Hornberger?

A I was his bookkeeper, girl Friday.

Q Will you tell us please, what your function was as the bookkeeper, gal-Friday, for Mr. Hornberger?

A Mostly accounts payable. I would pay contractors.

Q Will you explain to us what you mean

when you say accounts payable?

A I would make out the checks to the contractors at the end of the week, you know, the bills that they submitted and I would make bank deposits for the corporations.

Q All right.

A And keep the checkbooks.

Q Now, with respect to the receipt of monies for the corporations, would you tell us what procedure you followed?

A Well, I would receive contract monies, building loans and the final balances on closings.

Q All right.

A Closing fees and so forth.

Q Will you tell us what record you kept of corporate transactions?

A You mean, of monies that I received?

Q Yes.

A I had a ledger book and I kept each job on there. Which showed the contract price and the building loans that were received against that job and at the end, you know, the closing, I would have closing fees and any balance due on -- you know, from the mortgage that the client got, the closing statement and they would balance out.

THE COURT: Well, building loans weren't

received from the purchasers, were they? The bank loans?

THE WITNESS: Right. They are called building loans.

THE COURT: As the buildings progressed in construction?

THE WITNESS: In different stages, right.

THE COURT: Banks would advance certain loans, isn't that right?

THE WITNESS: Yes.

THE COURT: All right. Go ahead.

Q They would advance the monies to --

A The corporation.

Q All right.

How many corporations were operated at the time you were the bookkeeper for Mr. Hornberger?

A Five, if I remember correctly.

Q All right. Tell us the names.

A Story Book Homes, Horn Enterprise, Dotal Builders, Elpa Builders, Story Book Manor.

Q All right.

And this ledger book that you kept, did you keep it for each corporation or wat it one book for all corporations?

A No. One book.

Q Tell us, have you seen the book since you left Mr. Hornberger's employ?

A No .

Q All right.

Will you describe the book to us physically?

A It looks like one of those, on the top.

Q Have you ever seen these before?

A Yes, just over there.

THE COURT: One of those being a looseleaf--

THE WITNESS: Yes.

THE COURT: -- binder?

THE WITNESS: That is right.

It was that size. A small book.

MR. RYAN: These have not been marked. But I'd like to proceed, your Honor.

THE COURT: Mark them.

MR. RYAN: Mark them.

THE CLERK: Looseleaf book with papers marked Government's Exhibit 128.

Another one marked 129. 130, 131, 132 and 133 for identification.

(So marked.)

BY MR. RYAN:

Q Let me show you 133.

Tell me whether or not that's the book that you ketp?

A No.

Q Let me show you 132. Tell me if that's the book that you kept?

A No.

Q Let me show you 131, please. The same question.

A NO.

Q I show you 129, the same question.

A No.

Q No? You have to answer for the Reporter.

A No. I'm sorry.

Q How about 128? Is that the book that you are referring to?

A No.

Q It physically looked like one of those books?

A Yes.

Q All right.

Now, did you have one book for the five corporations?

A Yes.

Q The Court Reporter has to get your answer.

A I'm sorry. Yes.

Q Was the book subdivided in any way?

A Yes.

If I remember correctly, I had it divided either in sections or by corporations. I'm not sure.

Q All right.

A Sections, buildling sections.

Q All right.

Now, I'd like to ask you how you kept this book, to record these corporate transactions per job.

For, example, let's just take a house, all right? With one of the corporations and tell us from there what information you would receive and how you would put it in the book?

A Okay.

Client would go to contract. I would receive the contract with the down payment. I would --

Q Who would give you the contract and the down payment?

A Mr. Hornberger or Mr. Wolfsont or Mr. Fund.

Q What was his capacity?

A He was the salesman.

Q All right.

What would you do with that information?

A I would take the contract. I would read it.

Make sure I knew the corporations. The type of house. The contract price. And how much down payment and made sure that I receivedthe proper down payment.

Q All right.

But what entries would you make in the book?

A I would just put job number on the heading, and then I'd put the type of house and the contract price and then I would enter on one side the down payment received and the amount.

That's it.

Q Okay.

What was the purpose for keeping this record?

A To be sure I received all monies, down payments, and that building loans. We had to keep a record of the building loans that we received from the bank.

Q In connection with that job; is that right?

A Yes, with that particular job.

Q All right.

So after the stage where a down payment was made pursuant to a contract, what subsequent events would take place? What information would you receive and what information would you enter in your ledger booK?

A Right after contract?

Q Yes. During the stages of building a house.

A Nothing. Nothing until we were ready for a first building loan which meant the foundation, walls, I don't remember exactly how much.

Q Then a bank would advance money towards that?

A That is right. That is right.

Q All right.

And what would happen -- would you just tell us up to the point of closing?

A All right.

Q What further information you would receive?

A Just building loans.

Q Building loans; is that right?

A Yes.

Q Explain to us -- I know you explained once on building loans but that's money paid by whom?

A When a client goes to a bank and receives a mortgage, gets approved for a mortgage, let's say it's a $20,000 mortgage, the bank allows the builder a certain amount of that money to build the house. And it's usually --

Q Instead of waiting for the closing?

A That is right. It's usually done in stages.

THE COURT: How many payments?

THE WITNESS: I believe it's seven. Seven.

THE COURT: Seven payments.

A I believe so. I am not sure.

Q And the checks from the bank are payable to who?

A The corporation.

Q The down payments were payable to whom?

A The corporation.

Q Now, can you tell us how you kept this book after you had allthe building loan entries?

A I would just hold on to it until we were ready for closing. Once we closed I would receive a closing statement.

Q From whom?

A From either Mr. Hornberger or Mr. Wolfston.

Q And what would you do with the information in the closing statement with respect to your book?

A I would enter the closing fees into the -- into the ledger sheet and enter the monies received from the client and they should balance out.

Q all right.

A And difference of mortgages, too.

Q I'm sorry. Enter monies received.

What information were you given about monies received?

A I would receive the checks.

Q The checks payable -- paid by the buyer?

A Paid by the buyer.

Q To whom?

A If there was a difference, to the corporation.

Q All right.

A The balance due on contract.

Q All right.

What would you do with the information on those checks?

A I'd enter into the ledger sheet and the monies I received and the closing statement plus the contract price always equalled out.

Q All right.

Under this procedure, -- withdrawn. Are you familiar with the term "extras"?

A Yes.

Q In the building industry?

A Yes.

Q What is your understanding of that term?

A Anything extra other than the contract.

Q Were you given any information concerning extras?

A No.

Q For your ledger book?

A No.

THE COURT: Isn't it true that a certain house,

a certain model, had a price?

THE WITNESS: That is right.

THE COURT: And that was called the basic price, right?

THE WITNESS: The contract price, right.

THE COURT: Now, if a purchaser wanted something in addition to the basic house, that would be an extra?

THE WITNESS: Right.

THE COURT: All right.

BY MR. RYAN:

Q So now I'd like to direct your attention to the procedures you followed for the deposit of monies in the corporate bank accounts.

First of all, did each corporation have its own bank account?

A Yes.

Q Or how was that set up?

A Yes.

Each had its own checkbook.

Q All right.

Can you tell us the procedure you followed for recording the deposit of monies into the corporate bank accounts and any entries you made in connection therewith?

A Well, if it was on our closing, I would take the monies and put it in the ledger sheet, to balance out. Then I would make a deposit slip and in the checks stub or the receipt from the bank, I would put the breakdown of that deposit.

Q Have you seen that check -- any check stubs since you left Mr. Hornberger's employ?

A No.

Q All right.

I want you to explain to us slowly and as clearly as you can, how the deposits were handled?

You mentioned bank deposit slip, bank receipt clip, check stubs. Tell us what would happen?

A The checks would come in. I would make out a deposit slip for the proper corporation that the check was made out to. I would fill out the deposit slip and either myself, if I had time, would take it down to the bank or Mr. Hornberger or someone that was going to the bank would take it, deposit the money and come back with a receipt.

Now, the receipt would then be attached to the check stub and it would be broken down per job, if it was one-- more than one job. More than one check, I should say, on there.

Q All right. At any time under this procedure

did you receive any monies that you may recall for extra?

A Not that I can recall, no.

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Q What was the most accurate record under your procedures for recording and identifying a deposit of money into the corporation's accounts?

MR. BENDER: I object.

THE COURT: Objection sustained, it calls for a conclusion.

THE WITNESS: Do I answer?

MR. RYAN: No.

Q Now, did Mr. Hornberger have an accountant, that is when you were employed by him?

A Yes, sir.

Q What is his name?

A Mr. Canalè , Thomas.

Q Canale, C-A-N-A-L-E? Thomas Canale?

A Yes.

Q All right.

Were there occasions when you worked for Mr. Hornberger where Mr. Canale would request information?

A Yes.

Q How often would they occur, and what information would he request, and what information would you give Mr. Canale, tell us.

A Approximately maybe every four or five months, when he took the book from the office --

MR. BENDER: I am sorry, I didn't hear the

answer.

THE COURT: Will you, Mr. Karr, will you repeat the question and answer?

(The Reporter did as requested.)

MR. BENDER: Thank you.

THE COURT: Try to speak a little louder.

THE WITNESS: Okay.

BY MR. RYAN:

Q What books would he request under this procedure?

A The check books.

Q Any other records that you can recall?

A No.

Q Was there any discussion with Mr. Canale in this procedure, about the receipt of the monies for extras?

A Nothing.

Q That you can recall?

A Not that I can recall, no.

Q Did you open the mail in the morning as it arrived in Mr. Hornberger's office?

A No.

Q Who did?

A Mr. Hornberger.

Q During your period as the bookkeeper, did you ever receive any monies from Mr. Hornberger for deposit into

the corporate accounts?

A Yes.

Q Can you tell us, to the best of your recollectio what Mr. Hornberger told you on the first occasion?

A I don't recall the first occasion at all.

Q Did you make any entrieson the deposit receipt under the procedure you had testified to concerning these monies that Mr. Hornberger deposited in the corporate account?

A Yes.

Q Where did you make those entries?

A In the check stub or receipt.

Q What entries did you make when you received these monies from Mr. Hornberger?

A "EEH advance," or "EEH".

Q And upon what information-did you make that entry

A I don't understand.

Q How did it come about that you either wrote "EEH advance," or "EEH"?

A I was told to do that.

Q By whom?

A By Mr. Hornberger.

Q Was anything discussed about extras when he gave you these monies?

A No.

Q Was there any discussion as to what "advance" meant between yourself and Mr. Hornberger when you made the entry on the check stub concerning those deposits?

A I don't really recall any discussion about it.

Q No recollection at all?

A I am going back a few years, not really, no.

Q All right.

Can you tell us from your own recollection -- withdrawn.

You have not looked at any records concerning the deposits into -- withdrawn.

Are you able to tell us from your own recollection about how much money Mr. Hornberger had given you for deposit into the corporate accounts?

MR. BENDER: Excuse me, excuse me.

You mean with regard to all building or with regard to personal checks?

THE COURT: Repeat the question, please.

(The Reporter repeated the question).

THE COURT: Can you answer that question?

THE WITNESS: No.

THE COURT: Can you approximate the amount?

THE WITNESS: No.

THE COURT: You have no idea?

THE WITNESS: No, I don't know, I have no idea.

you know, money just came in and out, every week deposits were made.

THE COURT: All right, go ahead.

That is not the question, the question is -- would you repeat the question, Mr. Karr?

(The Reporter repeated the question.)

THE COURT: These are only deposits of money that Mr. Hornberger gave you, not other monies?

THE WITNESS: Oh, oh, you mean personal?

MR. RYAN: Yes.

THE COURT: That is right.

A No, I couldnt . I couldn't, no way.

Q Can you tell us how it came about that Mr. Hornberger gave you his personal monies for deposit into the corporate accounts: Yes or no?

A Yes.

Q Will you tell us?

A We would run short at the end of the week, and bills had to be paid.

Q All right. Well, just tell us, give us a little -- expand on that a little more, so we can clearly understand.

A Every Friday or Thursday evening, I would give Mr. Hornberg an account of the bills that we had to pay, what was outstanding, you know, to the contractors, or notes,

mortgages, whatever had to be paid, and an account of the check balances, it was in the checkbook, what --

Q What would you say with regard to bills due, and the balance of the accounts?

A Yes, needed money.

Q Pardon me?

A We need money.

Q Then these funds -- Mr. Hornberger, Mr. Hornberger would write a check out and it would be deposited into a corporate account: Correct?

A Yes.

Q How did you determine which corporate account that was put into?

A The one that was overdrawn, usually, or going to be.

Q All right.

And with respect to those, the deposits, and where you had made an entry into the check stub, they were the "advances"?

A Yes.

Q Now, I would like to direct your attention to the procedures you followed for payables on jobs.

Do you understand what I mean?

A Yes.

Q Will you explain what you understand by "payables"?

A Bills that had to be paid.

Q All right.

Did you pay all the bills or -- withdrawn.

Were you responsible for the payment of all bills by these corporations?

A Yes, I would say so.

Q You mentioned that you were familiar with the term "extras"?

A Yes.

Q Correct?

A Yes.

Q Were you familiar with the payments for extra work done while you were there?

A Payments to who?

Q To contractors.

A I paid all bills.

Q What I mean is, there has been testimony in this case that there were extras, such as additional insulation and things of that nature: Are you familiar with that?

A Yes.

Q Okay. Who paid for that insulation, for example?

A It went through me.

Q Who would the check be drawn on, on what account?

A Well, if it was at all possible, it would be drawn on the account that the house was built under.

Q Pursuant to the contract?

A Right.

Q Well, when you say --

A It's possible.

Q When you say "its possible", what do you mean?

A When the funds weren't available, then I would draw it out of another account.

Q Can you tell us whether all the extras, based on your proceduse that you followed, were paid by the corporations, Mr. Hornberger's corporations?

A Yes.

Q Did you have anything to do with his personal bank accounts?

A No.

Q You were not familiar with deposits into his personal bank accounts, or anything that happened in his personal bank accounts?

A No, no.

THE COURT: When a subcontractor, for example, you take the insulation subcontractor --

THE WITNESS: Yes.

THE COURT: (Continuing) Had a contract for the houses, did you know what the price of insulation for the basic house was?

THE WITNESS: Yes.

Q And when he billed, did he show you the basic price, and then show how much the extra was?

THE WITNESS: That is right.

THE COURT: You paid the entire bill from a corporate account?

THE WITNESS: Yes.

THE COURT: And it was based on both the basic and the extra, the total?

THE WITNESS: The total, the total, right.

THE COURT: Go ahead.

MR. RYAN: Thank you, sir.

I have no further questions.

THE COURT: Mr. Bender?

MR. BENDER: Yes, your Honor.

(Continued on next page.)

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CROSS EXAMINATION

BY MR. BENDER:

Q Miss Coletti, at the time that you worked for Mr. Hornberger, were you employed by any one particular corporation; do you recall?

A I believe Horn Enterprises was it.

Q You were paid --

A Through Horn Enterprises.

Q You were paid by Horn Enterprises?

A Yes.

Q And were the other corporations located in the same office where you were?

A Oh, yes.

Q Where you did your work?

A I think so, yes.

Q And during that time that you worked there, and by the way, did you tell us when you left?

A No.

Q Do you remember when?

A I left, came back, left, and I don't remember the exact dates.

Q You started you say --

A May, I remember when I started.

Q May of 1967?

A Right, until either August -- August or May of '71 or '72, I'm not sure.

Q So roughly a little over four years?

A Four years roughly.

Q Were you really entitled as a bookkeeper?

A Chief bottle washer, too, I guess, I don't know.

Q I can't hear you, will you keep your voice up.

A I was titled bookkeeper.

Q And whose place did you take, do you know?

A Yes, Sophie Pace.

Q Sophie Pace?

A Yes.

Q And did she give you any instructions as to how to handle the books?

A Very little.

Q Did you receive any instructions -- withdrawn.

Actually you did not handle any of the corporate books, did you?

A No, none.

Q These books which Mr. Ryan showed you, the exhibits, 128 for identification to 133 for identification, had you ever seen these books before?

A Yes.

Q Do you know what they are?

A They are Mr. Canale's accounting books.

Q They are Mr. Canale's accounting books?

A Yes, yes.

Q Or are these the books of the corporations?

A Yes.

Q Well now, which are they?

A Well, I would say they are the books of the corporations that Mr. Canale had.

Q Did you ever make or post any entries into those books?

A Not that I can recall, no.

Q Now, would you look and see on the outside of each one of those ledgers whether they pertain to a particular corporation?

A Yes.

Q Do they?

A Yes, they do.

Q Do they refer to the five corporations about which you have testified?

A Yes.

Q And do you have an idea what those books are called?

A No.

Q Well, we know they are ledgers?

A Yes.

Q Now, did you ever see those books kept in your premises?

A No.

Q Who and in whose possession were these books and records during the period of time when you worked there?

A Mr. Canale.

Q Mr. Canale?

A I think so, yes.

Q Were any of those books ever in Story Book Homes or Manor, Inc., or Elpa Builders, or Horn Enterprise?

A We kept books, but it was later years.

Q I am talking about 1967 and 1968?

A No, no, not at all.

Q You never saw those books?

A No, I mean I saw them, but they weren't in our office, they were in Mr. Canale's office.

Q Mr. Canale always had possession of them?

A I would say so, yes.

Q Do you know who wrote up these books?

A I think so.

Q Who?

A Trudy.

Q Who is Trudy?

A Mr. Canale's girl.

Q What is her full name?

A I don't know her last name, I just know her as Trudy.

Q How do you know that?

A Because she used to work for Mr. Canale and if she had any questions on any of the breakdowns, she would call me.

Q If she had any question on any of the breakdowns, she would call you?

A That is right.

Q On any of the breakdowns of what?

A In the checkbooks.

Q Well, when you received checks --

A Yes.

Q And made deposits, and when I say "you," I mean you or anyone else --

A Yes, I understand.

Q You told us that you listed the source of that deposit.

A Right, that is right.

Q And you listed it on the back of the checkbook stub of that particular corporation in to whose bank account you made or there was a deposit?

A Yes.

Q Now, suppose the check was two thousand dollars--

A Yes.

Q -- (continuing) -- deposited in Story Book Homes, what would you list on the back of the checkbook stub?

A Two thousand dollars and wherever the two thousand dollars came from.

Q Would you list the job number?

A If it was a job number, it would be a job number.

Q Yes.

Now, would you tell the Court and Jury when I mention job number what you mean by that?

A Each development or each area, each section had a job number, each house had a job number for identification and that is it.

Q You mean each particular house that was built?

A Yes.

Q For a customer or buyer?

A Right.

Q Was identified by a job number?

A Yes.

Q Now, when that two thousand dollars came in, presumably it was paid in, and I am using two thousand dollars as an illustration --

A Right.

Q Assume it was two thousand dollars paid in a deposit on a contract.

A Right.

Q And assume it was Mr. Campbell or Mr. Commet's, whoever testified here.

A Right.

Q Would you list on the checkbook stub the job number and the buyer's name, or just the job number?

A I don't recall whether I did both.

Q What is your best recollection?

A I would say the job number.

Q Just the job number?

A Yes.

Q All right.

Is it your testimony, then, that from what you had listed on the checkbook stub, that would be the information that would be picked up by Mr. Canale and Miss Paterno, Trudy Paterno?

A If that is her last name.

Q And that she would take that information and write up these books?

A Yes.

Q Now, how would they know what the job number was or what the job was for when they wrote up the job, did they

have the contract price?

A I don't think so.

Q Well, could they list the different jobs in these books?

A I don't know.

Q Do you know whether these books contained each job number?

A I don't know.

Q Do you know whether or not Mr. Canale and Miss Paterno listed the price of houses and how much money was received on advances for these houses?

A I wouldn't know that.

Q Well now, under what circumstances would they question you about some items?

A If I didn't put the job number down, my own mistake.

Q And would you have -- in other words, you would not put the job number down on the back of the checkbook stub?

A That is right.

Q So they would know from whom the check came?

A That is right.

Q What did they do in a situation like that, when they found an unidentified deposit which you had listed on the back of the checkbook stub: do you know what they did?

A Yes.

Q What did they do with it?

A They called me.

Q Did they always call you?

A No.

Q Do you know something called an expense account?

A I do now.

Q You do now?

A Yes.

Q You didn't know before?

A No.

Q You didn't know what an expense account was during 1967 and 1968?

A No.

Q Did you know that Mr. Canale or Miss Paterno, if they had a deposit which was not sufficiently identified for them to allocate it to the proper job number or account, did you know they would put it in a column called an expense column?

A No, I did not know that.

Q You did not know that?

A No.

Q Now, did you ever show Mr. Canale and Miss Paterno this other book about which Mr. Ryan has questioned you?

A I may have showed it to Mr. Canale, not -- I have never met Miss Paterno.

Q You never did?

A No, face-to-face, no.

Q You may have shown it to Mr. Canale?

A Yes.

Q Well, did Mr. Canale say, I am keeping the same kind of record that you say you are keeping?

A No.

Q As I understand it, you said that you kept a record of each job number?

A Yes.

Q And the contract price?

A Yes.

Q Did you keep the name of the purchaser, the name of the purchaser?

A I don't recall, I don't think so.

(continued on next page)

Coletti - cross

1
HS-BB
7PM-Reel 1

Q And you also kept a record of all the money that came in? Is that correct?

A Yes.

Q So that you kept a record on this so-called ledger?

A Yes.

Q You also put a record of the source of the monies on the back of the checkbook stub?

A That's right.

Q And you don't know if Mr. Canale also kept a record of all jobs in process, all jobs completed?

A I would say he probably did.

THE COURT: Do you know?

THE WITNESS: I don't know.

THE COURT: Strike it out.

Q Did you have anything to do with the preparation of any of the corporate income tax returns for 1967 and 1968?

A Not that I know of.

Q Now, Miss Coletti, you mentioned personal checks given to you by Mr. Hornberger.

A Yes.

Q I take it that was done from time to time during 1967 and 1968?

A Yes.

Coletti - cross

Q Is that right?

A Yes.

Q We are only interested in the years 1967 and 1968.

A Yes.

Q Could you tell us to the best of your recollection whether you were present working for Mr. Hornberger when that revenue agent -- Jeremiah -- came in and made an audit of these corporate returns for 1967 and 1968?

A The name is very familiar to me.

Q Do you remember some Government agent coming in?

A I remember the name Jeremiah.

Q Would you remember sometime in 1969 or 1970?

A I can't pinpoint the date, but I do remember the name.

Q You had job files in the office, did you not?

A Yes.

Q And what did you have?

A You are talking about the contracts?

Q Regular job files.

A All the papers pertaining to the building of a house, building permits --

Q Did you have the contract?

A Yes.

Q And did you have any correspondence?

A Yes.

Q And what else?

A Building permits.

Q Yes.

A Surveys.

Q Yes.

A Title search, any correspondence from the customer, any correspondence to the customer -- I can't think of anything else.

Q Did you also have any index cards?

A Yes.

Q Cards reflecting the extras ordered?

A Any additions.

Q Additions and extras ordered?

A Yes.

Q This was all part of the job file?

A Part of the job file.

Q Did you also have a correspondence file -- a general correspondence file?

A I don't really know. I didn't handle -- you know, any correspondence.

Q For example, you are familiar with the fact that letters were typed by various girls in the office to the buyers?

Coletti - cross

A Right.

If they kept a general correspondence file, I don't know. They may have.

Q You are familiar with that policy, were you not?

A I think so.

Q In your time, who were the girls that worked in the office for the various corporations?

A Charlotte Waugh.

Q W-a-u-g-h?

A Yes.

Jean Bowesman.

Q Did she marry?

A Yes, I believe she did marry.

Constance Huff and Rita Perrin.

I don't know anything after '69.

Q I am just talking about between '67 and '68.

A I do not know the other girls.

Q There was a girl substitute that took care of extras?

A Yes.

Q Who was that?

A Just from girl to girl.

Q Did Charlotte Waugh do it?

A Yes.

Q Did Rita Perrin?

A Yes.

Q When we say she was the "extra girl", would you tell us what we mean by that?

A They would handle the complaints -- any problems that they had with the customer. They would deal with them. Any correspondence went through them, any additions on the house went through them.

Q Did they collect the money for the extras?

A I believe so.

Q On occasion?

A Yes.

Q And with respect to the correspondence, did they send out letter requesting agreements on extras ordered?

A Yes, I believe so.

Q Do you recall whether they actually sent out letters requesting extras to be paid to Mr. Hornberger personally?

A Yes.

Q Was that a part of the policy?

A Yes, I believe so.

Q In 1967 and 1968?

A I think so.

Q And that policy, as far as you know, was the

Coletti - cross

result of instructions from Mr. Hornberger to the girls in the office?

A Right.

Q There was no secret around the office that extras that were ordered were to be paid to Mr. Hornberger?

A Not that I know of.

Q Is that right?

A Yes.

Q There were mistakes sometimes and they were paid to the corporation; is that right?

A I think so.

Q And on occasions like that, did Mr. Hornberger create a fuss?

A I don't know.

Q Do you know whether he asked that the checks be made payable to him and not to the corporation -- I mean for extras?

A He could have. I wasn't present.

Q Did you yourself ever receive any money for extras?

A I may have. I don't recall.

Q Now, when letters were sent out by the girls in the office, did they sign Mr. Hornberger's name to those corporate letters?

A I believe so.

Q They had the authority to do so?

A Yes.

Q Were these letters which requested these extras to be paid and paid to Mr. Hornberger?

A YEs.

Q Where were these copies kept - was one put in the job file?

A I believe so.

Q So, one copy was put in each job file?

A I think so.

Q Was there also any other files in which copies were kept?

A I really don't know.

Q Do you know whether Mr. Hornberger also got an extra copy?

A I don't know that either.

MR. BENDER: Excuse me a minute, your Honor.

(Pause.)

Q Just to get back to the checks that you received from Mr. Hornberger, out of his personal accounts --

A Yes.

Q -- do I understand your testimony to be that there may have been times -- when he gave you a check out of

one of the bank accounts -- that you would sometimes indicate the source on the back of the check stub of the particular corporation to which the deposit was made?

A I'd say 99% of the time.

Q Ninety-nine percent of the time?

A (Nods head.)

Q You'd either put EEH or EEH Advance on the checks?

A Yes.

Q But you are not sure of which?

A No.

Q From your recollection would you say that the majority of the times,you put one form or another?

A Yes.

Q Which one?

A Fifty - fifty. I don't know.

Q In other words, you might have put EEH or EEH Advance?

A YEs.

Q Whenever you put EEH Advance, it simply meant to you that you were getting some money from Hornberger?

A Yes.

Q That he was advancing it?

A Right.

Q You told us you didn't know whether these monies that he was giving you represented extras received or what it was?

A No.

Q You didn't possibly know that?

A No.

Q That was a matter that concerned Mr. Canale?

A That's right.

THE COURT: The amount of money advanced was more or less fixed by you? You told how much you wanted?

A That's true.

Q You told him how much money you needed for each corporation, was that right?

A Yes.

Q And he turned the money over to you -- gave you the money?

A Yes.

Q But in the form he gave you the money, you didn't know whether he was giving you money which represented payments of extras or what it was for?

A That's right.

Q It was just money coming from him?

A That's right.

Coletti - cross

Q Now, I show you 60 in evidence. That's a copy of a letter that has been marked into evidence, Miss Coletti?

A Yes.

Q Does that refresh your recollection as to whether you ever acknowledged receipt of payment for extras?

A I don't see any that I acknowledge.

Q I didn't say that you did.

A Oh.

Q But you said you didn't have any recollection.

A I don't.

Q You said it was possible?

A Yes.

Q Looking at that letter, does that indicate that you signed or rather issued a letter acknowledging receipt of extras?

A Yes.

Q For what corporation?

A Picture Book Homes, Story Book Manor.

Q Involving what buyer?

A Mr. Hintenberg (phonetic)

Q And you signed it?

A Coletti.

Q For the corporation?

A Yes.

Coletti - cross

Q I show you 50_A in evidence. This is another copy of a letter to the same buyer dated March 23rd, 1968.

This has the initial EEH:CH. Do you know who typed that?

A Connie Huff.

Q Do you know who signed Mr. Hornberger's name?

A Connie did.

(Continued on next page.)

Q Was there any reason you didn't sign Mr. Hornberger's name to this letter of June 25th, 1968?

A Yes.

Q If you remember?

A I know why I didn't.

Q Why?

A Oh, because in a case where I received any moneys other than to the corporation, I signed personally so that they would know that I received the money personally.

Q So somebody should know that youdidn't put tit into your pocket?

A That's right.

Q Now, do you know during the times that you worked there that extras were actuallypaid to the corporation?

A Not that I can recall.

Q No?

A No.

Q When you received a contract, which reflected an additional payment for extras, did you enter into the job file a listing of the extras?

A No, I didn't.

Q Where was the record kept as you said --

withdrawn.

Who made the record in the job file of the extras that were ordered?

A One of the other girls.

Q Do you remember whose job it was?

A Whoever was there at the time.

THE COURT: So all these girls that you mentioned, weren't all there at the same time?

THE WITNESS: No, we had quite a turn-over.

THE COURT: Did you have more than one girl in addition to yourself in the office at any one time?

THE WITNESS: Yes -- I don't remember the periods.

THE COURT: More than two?

THE WITNESS: No, I think it was always either one or two besides myself.

Q Well, Sophie, was she there when you were there?

A For a short period.

Q How about Rita -- Rita Perrin?

A Yes.

Q And how about Jean Bollman?

A Yes.

Q And how about Charlotte Waugh?

A For a short period.

Q How about Constance Miller or Huff?

A Okay, she was there for a short time.

Q It looks like most of them were there at least -- at some part, while you were there?

A Yes.

Q Now, do you know how Mr. Canale handled these deposits that you made to the corporation of checks from Mr. Hornberger's personal account?

A No, I don't.

Q Did Mr. Canale ever come over to you and say to you or Miss Paterno, "What was this check that you have listed as EEH or EEH advance -- what's that for?"

A He may have. I don't recall.

Q You don't recall?

A No, not really.

Q I take it that the amount of checks that you received from Mr. Hornberger -- from his personal accounts in 1967 and 1968 was a substantial amount, was it not?

A The way I understand, yes.

Q And if Mr. Canale had asked you, you would certainly remember, would you not?

A Yes.

Q What is your best recollection that they never

asked you, that Mr. Canale asked you or Miss Paterno never asked you?

A I would say they asked.

Q You think they did.

Occasionally?

A I'd say when he took the books, any questions that came up to that point.

Q There was nothing in the books about the extras?

A I thought you said about EEH advance on the check stub.

Q They just took the check stub?

A Just took the amount.

Q Do you recall what you told Mr. Canale at any time he asked you what this EEH was for?

A I would have told him what I thought.

THE COURT: Do you have a recollection of what you told him?

THE WITNESS: No.

THE COURT: You have no recollection of what you told him?

THE WITNESS: Not really.

THE COURT: Your best recollection is that you mentioned something about it?

THE WITNESS: Yes.

Q If you were asked?

A Yes.

Q And whether you were asked, you do have a recollection that you were asked some time?

A I would say so.

Q Would that be particularly in 1967 or 1968?

A I don't remember

Q Now, tell me this:

Did you ever issue to Mr. Canale any kind of schedule of completed jobs on houses that were contracted to be built by the corporation?

A Yes, at the end of the year.

Q What was the purpose of giving him that?

A I don't know what the purpose was. I just did what I was told.

Q Who asked you to give it to him?

A Mr. Canale.

Q What did he specifically ask you?

MR. RYAN: Just keep your voice up, please.

A Mr. Canale?

Q What did he specifically ask you?

A Jobs that closed, I guess, up to a certain date.

Q Did you ask him why he wanted that information?

A No.

Q In what form would you give him that information?

A Just a yellow legal piece of paper and just write the job numbers.

Q Where would you get the information from?

A From the book that I kept.

Q Would that book indicate merely that a closing had occurred -- is that what you mean?

A Yes.

Q So that if the closing had occurred, you'd know that the job was completed?

A Yes.

Q And the checks had been received, so you'd give him that?

A Yes.

Q Were there any closings that ever occurred where you didn't give him such a statement?

A Not that I know of -- I don't know.

Q Now, were you familiar with what records the corporations maintained to reflect the total moneys that it had received on a job other than --

A My ledger book, no.

Q Were you the only one who handled that ledger

book that you spoke of?

A Yes.

Q And did you keep this during the entire period of time that you were there?

A Yes.

THE COURT: Did you answer that last question?

THE WITNESS: Yes.

Q Did you leave that book there when you left?

A Yes.

Q Do you know where it was?

A In one of the filing cabinets in the office.

(Continued next page.)

THE COURT: I want to finish this witness, Mr. Bender.

MR. BENDER: I have to check the 3500 material which was given to me at lunch. It's going to take time, your Honor. I tried not to --

THE COURT: The jury may be excused.

(The following occurred in the absence of the jury.)

MR. BENDER: Your Honor, the only reason why I said what I did is I haven't examined the grand jury testimony. I looked at it hurriedly, the 35 minutes we had at lunch.

There are two affidavits given by Miss Coletti which I have to look at.

THE COURT: 55 minutes for lunch.

MR. BENDER: Not when we left here, your Honor.

THE COURT: Oh. I suspended at 20 minutes of 1.

MR. BENDER: We worked on -- we had some -

MR. RYAN: It really gets down to the grand jury minutes. The affidavits you've had for months.

MR. BENDER: That's correct. It's just the grand jury minutes. So I --

MR. RYAN: I am familiar with them. They are not --

MR. BENDER: No.

THE COURT: I cannot understand why a witness giving this kind of testimony has to come back.

Where do you live?

THE WITNESS: In Huntington.

THE COURT: In Huntington.

MR. RYAN: She has a medical appointment tomorrow.

THE COURT: Not only that, but most of the examination was conducted on what Mr. Canale knew.

MR. BENDER: Okay.

THE COURT: How does she know what Mr. Canale knew?

MR. BENDER: All right. If your Honor --

THE COURT: No. Listen, I am not going to limit your preparation, but I do not want this girl to come back.

MR. BENDER: Just give me 2 minutes.

THE COURT: I will give you as much time as you want. You tell me when you are ready.

You may step down.

(Recess taken.)

(Jury present.)

CROSS-EXAMINATION

BY MR. BENDER: (Cont.)

Q Miss Coletti, did Mr. Canale or Miss Paterno ever ask you for the job files or closing statements in the job files, during 1967 and 1968?

A Not that I can recall, no.

Q Were the job files in your office?

A No.

Q Where were they?

A In the front office.

Q In the front office? In a cabinet?

A Yes.

Q Accessible to you?

A Yes.

Q Accessible to all the girls?

A Yes.

MR. BENDER: I have no further questions.

REDIRECT EXAMINATION

BY MR. RYAN:

Q Can you just tell me how it came about that you wrote this letter of acknowledgement receiving a check for extras as shown in government exhibit 60?

A Many times girls were out to lunch and I would cover the phones and cover the front desk and if

someone would come in with a check and I would give them a receipt for it and --

Q Are you able to tell us whether or not the check was made out to the corporation?

A I cannot tell. I don't recall.

Q Okay. You told us that you were aware -- that letters were sent to buyers directing them to make payments to Mr. Hornberger personally; correct?

A Yes.

Q Sort of company policy?

A Yes.

Q Were you ever given any reason why these checks were to be made out to Mr. Hornberger personally?

THE COURT: Any objection to that question?

MR. BENDER: I object.

THE COURT: Objection sustained.

"Were you ever given any reason" is objectionable. If you want conversations, ask the witness whether she ever had a conversation with the defendant.

Q Did you ever have a conversation with Mr. Hornberger as to why he was directing people to make checks out to him personally for extras?

MR. BENDER: Your Honor, I object to that.

THE COURT: Overruled. I will allow it.

A No.

THE COURT: Anything further?

Q It is conceded in this case --

THE COURT: Objection sustained.

MR. BENDER: I object.

Q Do you have any knowledge whatsoever of the receipt by Mr. Hornberger into his personal accounts of about $156,000 for extras?

A No.

Q None whatsoever?

A No.

MR. RYAN: Thank you very much.

THE COURT: Anything further?

MR. BENDER: No further questions.

THE COURT: You may step down. Thank you.

THE WITNESS: Thank you.

THE COURT: The case will continue tomorrow promptly at 10 o'clock. I ask the jury to come into the Courthouse about 20 of 10. First register downstairs in the Central Jury Room and then come to the Jury Room adjoining the Courtroom immediately.

It is important that every juror get here on time and I usually start promptly at the time fixed.

Do not talk about the case. When you reassemble tomorrow, do not discuss it among yourselves.

The jury is excused.

(The following occurred in the absence of the jury.)

THE COURT: I wanted to say something before you left, Mr. Bender. I am sorry I seem to be delaying you. I know you are in a hurry, but if there are applications that either side makes or wants to make, advise the other side, find out how long it's going to be and then advise me and come in before the jury comes in at 10 o'clock. Any applications, motions should be disposed of before 10 o'clock. I expect to bring the jury in promptly at 10.

All right, gentlemen. Again I'm sorry that I delayed you.

MR. BENDER: That's all right.

(Whereupon, a recess was taken until June 25, 1974 at 10 o'clock a.m..)

* * * *

1 HS-BB JAM-Reel 1

THE CLERK: The case on trial, United States of America vs. Elmer E. Hornberger.

THE COURT: Both sides ready?

Seat the jury.

I have a note that juror No. 6, Kenneth Carnisi has a stomach virus and is burning up with fever.

MR. BENDER: I thought he was nine or ten.

Is he the student?

THE COURT: He is the student.

MR. BENDER: That is not Carnisi.

THE COURT: We will find out who is missing when they come in. The message I got is that it was juror No. 6.

MR. RYAN: I would like to file a proposed stipulation.

MR. BENDER: Why file it until I look at it and agree to it.

THE COURT: If it is going to be signed, let it be looked at first.

Juror No. 6 is Kenneth Carnisi.

Alternate juror No. 1 is also missing.

MR. BENDER: I beg your pardon?

THE COURT: Alternate juror No. 1 is missing.

MR. BENDER: May we just wait a few minutes?

THE COURT: Yes. I'm not going to continue

the trial without alternates.

If you have the transcript of the pre-trial conference, that had the concession in it.

MR. RYAN: We are getting it.

THE COURT: You conceded if they were called to testify that is my recollection is that you conceded the fact. To a jury it matters little. I think you did concede the fact they were called.

MR. BENDER: I will concede the fact -- there is no question about it -- that extras were paid. I think the language of the stipulation --

THE CLERK: He has not appeared yet.

MR. BENDER: May I be excused?

THE COURT: You said something in your opening and I did not know whether I should comment on it or not. You said what the Government claims is a double tax. That is not the claim here. If this were a civil matter and you made that claim, that would be something else.

All they are saying is he committed a crime in failing to report it in the corporate income tax return and he knew he should have done it, and secondly he committed a crime when he failed to report it in his. You may claim --

MR. BENDER: No, no. I did not say that.

THE COURT: I tried to copy it verbatim.

MR. BENDER: I may have expended beyond what I intended. All I am saying is --

THE COURT: I may forget it, but if you go before the jury and in effect say the Government is trying to persecute my client by giving us a double tax -- we are honest people -_ we are willing to pay a single tax -_

MR. BENDER: I can't say that.

THE COURT: I do not know. You'd be surprised in what I hear.

MR. BENDER: You would charge them on the law that the law provides that the corporation has to pay a tax and the individual would have to pay a tax. I would be foolish to say that.

If you want I will give you a request and I am sure Mr. Ryan will so indicate under the Internal Revenue Code the additional income which was omitted from the corporate return, which the corporation should pay X number of dollars in tax, likewise it was taken by the defendant and used by him personally and controlled by him personally and was not turned over to the corporation, it would be a constructive dividend. There is no problem. I do not mean to give that impression.

THE COURT: I want to stay away from the arguments that a party makes, whether the Government or defendant. If either makes an unfair argument and presents a distorted picture of what the other's position is, then I might feel obligated to say something in my charge.

MR. BENDER: I would have no objection to that. I will try not to.

THE COURT: What is the latest?

THE CLERK: They will call Staten Island.

MR. RYAN: I would like to mark three documents to which Mr. Bender has agreed.

MR. BENDER: Do we need the Judge?

THE COURT: Fine.

(The following occurred out of the presence of Court.)

MR. RYAN: George Mazzella, Grand Jury minutes.

THE CLERK: Marked Government's Exhibit 134 for identification.

MR. RYAN: 37-page special agent report on George Mazzella.

THE CLERK: So marked. Government's Exhibit 135 for identification.

MR. RYAN: Special agent's chronological work sheet.

THE CLERK: So marked Government's Exhibit 136 for identification.

(Recess taken.)

THE COURT: The juror has finally arrived. I think we can start.

(Jury present.)

THE COURT: We had an unfortunate experience today. First juror No. 6 called and said he had a stomach virus and had a high fever and could not attend. I will ask Alternate No. 1 to take the seat of juror No. 6 and I think Alternate No. 2 ought to take the seat in the first row. I think you will get a better view. I understand that Alternate No. 1 got a flat tire. We are now ready. Call your next witness.

THE CLERK: Come forward, please, and stand right over here.

(Continued on next page.)

CHARLOTTE WAUGH, called as a witness having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: State your full name.

THE WITNESS: Charlotte Waugh.

DIRECT EXAMINATION

BY MR. RYAN:

Q Mrs. Waugh, wouldyou please tell us your occupation?

A Bookkeeper.

Q Who do you presently work for?

A The Paar Company.

Q What business is that company engaged in?

A Land developing.

Q Did you ever work for Elmer E. Horberger?

A Yes.

Q When?

A October, 1965 to February, 1968.

Q And what was your position when you first worked for Mr. Hornberger as an employee?

A Girl Friday, secretarial and bookkeeping.

Q How about in 1967, what was you position in the company?

A Mostly secretarial.

Q Mostly secretarial?

A Yes.

Q You left February, 1968; is that right?

A Yes.

Q And what was your position when you left in February of 1968?

A Secretary.

Q Now, as secretary, can you tell us just very generally and briefly what were your responsibilities?

A Taking care of the basic correspondence, doing filing, form letters -- filing, general secretarial chores.

Q Did you have anything to do with extras?

A As secretary, I had wo write letters that would authorize extras.

Q All right.

MR. BENDER: Excuse me. May we have the last part?

THE COURT: Would you read the question and answer?

(Record read.)

Q At the time you were there, were you the sole person in charge of that function?

A I believe so.

Q I would like you to tell us the procedures that you followed in conducting correspondece relative to extras.

First of all, would you tell us the beginning of your procedures, how you became involved in correspondence concerning extras?

A When construction was started on a home, we would ask the purchaser if there were any additional -- additions that they wanted to their home.

THE COURT: When you say "we," is that you would or someone else?

THE WITNESS: I would write the letter and ask the customer if they had been interested.

THE COURT: Mr. Ryan wants to know what your first contact would be. Did someone first tell you what the extras were or to write a letter concerning extras or did you do it on your own?

THE WITNESS: I understand.

Mr. Hornberger would instruct me to use this procedure.

MR. BENDER: [illegible], your Honor. We are talking about the period 1967 to 1968.

THE COURT: Is that correct?

MR. RYAN: That's what I'm asking about.

THE WITNESS: Well, at that time I had learned my job and I would do it automatically.

THE COURT: When you say "automatically" --

THE WITNESS: I was instructed when I first went there to do this.

THE COURT: Mr. "X" was a purchaser.

THE WITNESS: Yes.

THE COURT: How would you know that Mr. "X" ordered extras? Would someone give you the contract? Would someone say --

THE WITNESS: They wouldn't be in the contract. The basic house would be in the contract and at the time the house was beginning to be constructed, we would give them one last chance to put any additions, extras, whatever.

THE COURT: You say extras were never recited in the contract?

THE WITNESS: It was a custom-built home so there would be changes in the contract, but there would be others later on -- custom-built home, there would be so little change.

THE COURT: Would you be advised immediately upon the execution of the contract that the purchaser bought a home?

THE WITNESS: I believe I was, yes.

THE COURT: Who told you?

THE WITNESS: Mr. Hornberger.

THE COURT: All right. Take it from there.

BY MR. RYAN:

Q After Mr. Hornberger told you that a particular person contracted to have a house built, what would you do with respect to extras? What is the first thing, what information would you receive, if any, any additional information, and what would you do?

A To the best of my recollection, it would be at the time they were beginning to build the house, if there were changes the superintendent would be so advised and -- as I said, we asked them if they wanted to do something additional to their home at that time.

Q Who would do the asking and how would it be done?

A Ask me to write the letter under the instructions of Mr. Hornberger.

Q Okay.

What kind of a letter was this?

A Generally it was a form letter stating that we were about to start their home and if there were any changes that they were interested in, now was the time to

do it.

Q What kind of a letterhead, if you can recall, were these letters sent out under?

A The letterhead was contingent on the contract, what corporation the contract was taken.

Q All right. The corporations that agreed to build the house, that is what you based the letterhead to be sent on?

A Yes.

Q After sending out these letters under your procedures, asking buyers whether they wanted any additional work, what would be the next step in your office procedures?

A Generally the customer would contact us, either by calling and making an appointment to see Mr. Hornberger and agreeing to the extras -- if they didn't contact us, we would contact them to see if they had received our letter.

Q After a buyer gave a response, what was the next step that you followed in your office procedures?

MR. BENDER: Excuse me, your Honor.

Where the witness says the buyer would contact us, would we have a -- be a little more definite?

THE COURT: Was there a fixed procedure if the buyer came into the office? Would the buyer be

directed to you --

THE WITNESS: No, to Mr. Hornberger.

THE COURT: To Mr. Hornberger?

THE WITNESS: Yes.

BY MR. RYAN:

Q After that event, what would be the next thing that you would do under your procedure, if anything?

A If they contacted us, meet with Mr. Hornberger. I would inquire whether we had been paid and if so, I would -- I had a file on my desk to follow up and when the person paid us, I would destroy the file. If they didn't, we'd follow with a follow-up letter.

Q Who would you make an inquiry of concerning payment of extras?

A Mr. Hornberger.

Q Do you know what extras were ordered when you made that inquiry?

A Yes, from the letter I had sent to the customer.

Q Did you make any record of these extras and the amount of money that would be due?

A I don't recall.

Q After you inquired as to whether payment has been made for extras of Mr. Hornberger, what is the next step that you took, if any, in this procedure?

A If the funds had been received, I destroyed my card file and if not --

Q We'd like to know when you made this card file. We'd like to know the procedure and the records you kept during the steps following this procedure.

When did you make cards?

A I'd make the card up when I originally wrote the letter to the customer.

Q This was an index card?

A Yes.

Q And you'd have to receive a response from the buyer as to whether or not they wanted any extras; is that correct?

A Yes.

Q If you received an affirmative response that they wanted the extras, what record would you make at that time?

Do you understand my question? You look at little puzzled.

A I don't quite -- I don't recall all of my jobs.

THE COURT: Wouldn't you make an extra card when you were authorized to perform the extras?

THE WITNESS: Well, I don't know if it was my job to inform the superintendent to do it or not,

if that's what you are asking.

THE COURT: When would you make the card?

THE WITNESS: At the time I sent out the letter.

THE COURT: Even before you got the authorizations?

THE WITNESS: So that -- anticipating that funds would be coming, I would be aware of this particular file, yes.

THE COURT: But was there a letter when you inquired of the purchaser whether he wanted extras?

THE WITNESS: That was the original letter, yes, and at that time I would make up a card to follow through.

THE COURT: If no reply was received, that indicated the purchaser wanted no extras; right?

THE WITNESS: Not necessarily. We would --

THE COURT: Still hold the card?

THE WITNESS: Still hold the card until such time it would be too late to put the extras in.

THE COURT: That card was meaningless --

THE WITNESS: To anyone but me.

THE COURT: Until extras were ordered?

THE WITNESS: Yes.

THE COURT: When extras were ordered, you made

a card up; right?

THE WITNESS: This was just a card for me, to remind me to see if the funds were received.

R2
~~xx~~xR3fls.

(Continued on next page.)

THE COURT: Well, wouldn't the card show the extras in detail -- the type of extras and the cost?

THE WITNESS: It would have it. I cannot recall.

THE COURT: Not necessarily?

THE WITNESS: I would write the purchaser's name and the amount next to it.

THE COURT: The amount of what?

THE WITNESS: Amount anticipated on the extras.

THE COURT: All right.

BY MR. RYAN:

Q Let me get to the point of your procedure as to payments for the extras, all right?

A YEs.

Q First of all, did you have -- what was your procedure for collecting payment for the extra work?

A If the reply was affirmative and they contacted us, I would make an appointment for them to turn the funds over to Mr. Hornberger.

Q ANd when in terms of time -- in relation to the building of a house -- would that be done?

A As soon as we started construction of the home.

Q After you made an appointment for the buyer

to pay for the extras, what would be the next thing that you did?

A I would inquire if the purchaser had paid for the extras after the meeting.

Q Who would you inquire of?

A Mr. Hornberger.

Q In terms of time, can you tell us whether this payment would be made before the extras were installed or after they were installed?

A Before they were installed.

Q Did you receive payment for the extras -- you personally receive them in your hand?

A I don't believe so.

Q Under your procedure --

A Under my procedure, no.

Q Did you open the mail at all?

A No.

Q Who did?

A Mr. Hornberger.

Q After Mr. Hornberger would tell you whether payment was made, would you do anything else with respect to extras?

A I don't believe so.

Q After you inquired of Mr. Hornberger whether

extras were paid and he told you that they were not, what would be the next step in your procedure?

A I believe I would send the purchaser a reminder.

Q In what form?

A Letter form.

Q Let me show you Exhibits 38A, 38B and 38C. There are three letters dealing with a purchaser by the name of Mr. Kinetz.

Do you recognize those documents?

A Yes, I typed them.

Q You typed those letters?

A I believe so.

Q All right now, those were typed or prepared under the procedures that you testified to?

A YEs.

Q Well, would you take the letters in chronological order and explain to us how it would come about then that the letters were written in the times indicated under your procedure?

A Mr. Kimetz must have been interested in these extras and I was so instructed by Mr. Hornberger and I would write the letter.

Q All right, you are referring to --

A April 12.

Q You were informed by Mr. Hornberger that Mr, Kimetz ordered these extras?

A Yes.

MR. RYAN: I would like to show this to the jury and proceed with the next one?

THE COURT: Is it in evidence?

MR. RYAN: Yes.

THE COURT: I would like you to show counsel the letter each time, to make certain it is in evidence.

MR. RYAN: Yes.

(Document shown to counsel.)

THE COURT: You may continue.

Q By that letter Mr. Kimetz accepted the construction or installation of extras?

A It's unsigned, but I would think so.

MR. BENDER: I want to give you back the letter.

MR. RYAN: I would rather --

MR. BENDER: I would like to give you back the letter. Don't you want it?

Your Honor, it has been marked into evidence.

THE COURT: You may give it to the jury.

(Document shown to jury.)

Q After that letter was sent, was it received by your office?

A That is the reading file letter. It is not a signed letter.

MR. BENDER: I cannot hear the witness.

THE WITNESS: It is the reading file letter. It is not signed by the customer. The customer must have kept his letter.

Q AFter that letter was sent, did you send another letter?

A Yes, he must have expressed a desire for more extras.

Q That is shown by 38C?

A Yes.

Q How did it come about that you wrote 38C?

A I was instructed.

Q By whom?

A Mr. Hornberger that the customer wanted more extras.

MR. RYAN: I wish to show this to the jury.

(Shown to counsel.)

MR. BENDER: It is O.K., your Honor.

(Document shown to jury.)

Q After that second letter was sent dealing with

additional extras or extra extras, did you write another letter in connection with Mr. Kimetz's house?

A Yes, he desired a stove.

Q That would be 38A, correct.

A Correct.

Q How would it come about that you wrote that letter?

A Under the directions of Mr. Hornberger.

(Document shown to counsel.)

MR. RYAN: Counsel asked me whether Mr. Kimetz identified the letter yesterday.

MR. BENDER: It is not signed.

I have no objection.

(Shown to jury.)

Q All these letters that are being shown to the jury deal with ordering extras, correct?

A Yes.

Q Did you send letters under your procedure dealing with any payment for extras?

A Yes, I would request payment.

Q Do you recall whether this was a form letter or not -- this letter relating to payment?

A Basically it was a form letter.

THE COURT: Do you mean you had printed copies

or did you use a form in typing each one?

THE WITNESS: A form in typing each one.

Q Let me show you 38A, it is a letter dated June 13, 1967. Do you recognize that?

A Yes.

MR. RYAN: It is in evidence.

Q Do you recognize it?

A Yes.

Q Sir, what is it?

A It is a letter requesting that the purchaser forward their checks to us.

Q Does it say anything about how the checks should be made out?

A Shall I read the letter?

Q Please do.

A Please be good enough to forward your check to the order of Elmer Hornberger in the amount of $610 to cover extras for your new home, job number 14, Stony Brook Manor, prior to the closing set for June 23 at the Roosevelt Savings Bank at 1:00 p.m. Very truly yours.

Q Can you tell us what part of that letter is standard language under the procedure that you followed?

A That is a standard letter.

Q That's the standard letter, all right.

I think you said -- when did you start working for Mr. Hornberger?

A October of '65.

Q And do you recall when and under what circumstances you received instructions to prepare the letter in that form?

A I imagine that it was dictated to me the first time and it went on from there.

MR. BENDER: I object to that and move to strike.

THE COURT: May I have the question and answer?

(Testimony read.)

THE COURT: Objection sustained.

Strike it out.

(continued next page.)

Q Can you tell us whether you had any conversations with Mr. Hornberger concerning the preparation of these letters as the one before you?

A Yes.

Q Can you tell us approximately when?

A I imagine, I would believe, in the first few weeks of my employment.

Q What is your best recollection of the instructions that were given to you regarding the form of the letter requesting payment?

A I was told to prepare a letter to the customer --

THE COURT: Was it dictated by Mr. Hornberger or --

THE WITNESS: I cannot recall. Either it was dictated to me or there was a form letter in existence; I cannot recall. That was many years ago.

Q In your discussions with Mr. Hornberger, did you ever have --

MR. RYAN: Withdrawn.

Q Did you ever discuss with Mr. Hornberger as to why the letter should request payment to him personally?

Yes or no?

MR. BENDER: I object.

THE COURT: Overruled.

I will allow it. Just yes or no.

THE WITNESS: No.

MR. RYAN: All right, thank you. No further questions.

I would like to show the jury 30A.

THE COURT: All right. Mr. Bender, do you agree that 30A is in evidence?

MR. BENDER: Could I just ask a question on the voir dire?

VOIR DIRE EXAMINATION

BY MR. BENDER:

Q This is 30A, Miss Waugh. Would you please look at that. Did you say you recognized having typed that letter?

A Yes. My initials are on the letter.

Q Did you sign Mr. Hornberger's name to that letter?

A Not in this letter. I had signed his name to many others.

Q There is some handwriting at the bottom?

A Mr. Hornberger's.

Q Do you know when that was put on?

A No, sir. It would appear from the date --

Q No --

A No, I don't know when that was put on.

MR. BENDER: All right, I have no objection.

THE COURT: All right, you may cross examine.

MR. BENDER: Your Honor, could I just get some Government exhibits.

(Document referred to being Government's Exhibit 30A was previously marked in evidence at the pretrial.)

MR. RYAN: Counsel has requested the contracts that were marked yesterday. I am handing him Government's Exhibits 121 and 127.

CROSS EXAMINATION

BY MR. BENDER:

Q Miss Waugh, in 1967 and 1968, I take it from your testimony, you were a secretary?

A Yes, sir.

Q And were you a secretary for all of the corporations? Were you employed by all of the corporations or just a particular one?

A For all corporations.

Q And which were those corporations?

Do you remember?

A I have seen correspondence, Horn Enterprises, I believe, Dotal, Storybook Homes, Storybook Manor, Elpa.

Q And were you during the period of 1967 and 1968 an extra girl, so-called?

A Secretary or an extra girl in the office?

MR. BENDER: Well, I withdraw the question. I do not think I made myself clear.

Q Were you called -- you say you were a Girl Friday when you started?

A Yes.

Q But in 1967 and 1968 were you the sole girl in the office that took care of extras, extras on the buildings?

A On the correspondence, yes.

Q And in 1967 and 1968, there was a policy of the office, by that I mean the corporations, to send out letters to the various buyers who had ordered extras? Isn't that correct?

A Yes.

Q And that was a matter of policy, was it not?

A Procedures.

Q ANd, as a matter of fact, in the early part of 1967, did you alsc send out letters requesting confirmation of the extras?

A Yes.

Q And do you recall ever sending out letters early in 1967 where you did not direct that the buyer as such

should pay the extras to Mr. Hornberger?

A I could not recall.

Q Is it possible that you did?

A It is possible that I did.

Q Is there in your recollection a period of time when that procedure may have changed?

A No.

Q What I mean by that is was it after the early part of 1967 as far as letters that you sent out and typed, then began to direct that the buyers pay the check for the extras rather than to the corporation, pay it to Mr. Hornberger?

A To my recollection the procedure remained the same through all the years that I was there.

Q In the early years, Mr. Hornberger wasn't in business by himself, was he; he had a partner, did he not, in 1965 and '66?

A In Storybook Manor, yes, he had a partner.

Q And now, when -- was that with respect to each letter that went out to a buyer? It wasn't your testimony that Mr. Hornberger specifically said with respect to each buyer, "Send the letter out," is that right?

A It was an automatic procedure.

Q It was an automatic procedure. The moment

that you found out from Mr. Hornberger that extras had been ordered, it was your function to send out letters to the customer or to the buyer, having them acknowledge that the following extras which were listed, which were ordered by them, should be accepted on the letter and check made payable for the extras to Mr. Hornberger?

A Yes.

Q This was the usual procedure?

A Yes.

Q I think you also indicated, and correct me if I am wrong, that you were the only girl in the office that sent out such letters during the time of 1967 and 1968?

A To the best of my recollection I was the only secretary.

Q Did Sophie Pace work there when you were there?

A Yes.

Q Do you know whether she ever typed any letters and sent them out requesting the buyer to confirm ordering of the listed extras? And asking that the check be made payable to Mr. Hornberger --

A Only that I saw these letters today could I recall it.

Q Only if you saw what letters today?

A I was shown correspondence today and it has

Mrs. Pace's initials on the correspondence that she so did as well.

Q Then I misunderstood you. I thought you said --

A I thought I was the only one who did to the best of my recollection, and after reading the letters I see that Mrs. Pace did as well.

Q How about Jean Borientele? Didn't she also --

A Mrs. Bauman did not work there at the same time I did.

Q Well, she worked there, didn't she, some time in the end of -- well, when did she work there? Do you remember?

A No.

Q But in any event, it is your recollection that she did not work there when you were working up until February, 1968?

A She came to the corporation, to my knowledge, at Christmas time about 1967.

Q Well, didn't she send any letters out?

A Not if I were in the office to do my job.

THE COURT: If she worked there at Christmas time in 1967 wouldn't you then have been working with her --

THE WITNESS: She was not working in the office.

THE COURT: Oh, I see, because you were there until February, 1968.

THE WITNESS: Yes.

Q But she was employed sometime at Christmas, 1967?

A It is my recollection of her being in the office at that time until I left the firm.

Q Is it your testimony that you did receive contracts which were entered into between the corporations that you have mentioned and the buyer? I am talking about 1967 and 1968 only, and if you could just zero in --

THE COURT: Contracts for the purchase of the house.

MR. BENDER: Yes.

A Yes, I received contracts.

Q You received them?

A Yes.

Q And did you read them?

A Yes.

Q And what was the purpose in your receiving the contract as a secretary?

A I don't recall my immediate chores as secretary. I imagine that I would have to make a record of this contract --

Q Excuse me. I would appreciate it if you

didn't use the word imagine, if you can.

THE WITNESS: To the best of my recollection?

MR. BENDER: Whatever is your best recollection.

THE WITNESS: I don't know what I did.

THE COURT: Well, if you have no recollection at all then the answer is you have no recollection.

THE WITNESS: Yes, sir.

THE COURT: But if you have some recollection, no matter how slight, then you may give your answer to the best of your recollection. We do not want pure speculation of what happened.

Q Your function in 1967-'68 was quite different than Vicki Colletti's, for example, isn't that right?

A Oh, yes, she was the bookkeeper.

Q And you were not?

A Yes.

Q Yet you received all the contracts in '67 and '68 which were entered into by the corporations for the building of the houses?

A Yes.

Q Do you recall whether you received those for the purpose of having you look to see whether there were any extras ordered?

A I don't know if that was the purpose.

Q But you aren't sure?

A No. It wouldn't be called an extra if it were in the contract. It would be part of the building of the home.

THE COURT: Even though it was an addition to the base price.

THE WITNESS: That is custom building, and that you can make amendments to the home.

THE COURT: So you understand extras to be any modification or addition after the contract is entered into.

THE WITNESS: Yes, sir.

Q Well, let me show you an example of a copy of a contract which is 121 in Evidence, and which has to do with a Mr. Walsh who testified here yesterday.

Now, do you see in that contract that in addition to the main sale price of the house to be built there are extras that were ordered and are listed there by amounts? Look at the front and then look at the addendum on the back, and then on the bottom.

(continued next page.)

THE COURT: What is the question, Mr. Bender?

Mr. Bender, the question, please.

MR. BENDER: I said, did you -- I thought I did. I'm sorry.

THE COURT: You just asked the witness to look at it.

MR. BENDER: I'm sorry.

BY MR. BENDER:

Q Have you read that? Do you see the word "extras" listed on the front of the contract?

A Yes, sir.

Q And on the last page of the contract?

A Yes, sir.

Q Let me show you another illustration, Government's Exhibit 127, which is a contract with Mr. William P. Campbell, and his wife.

Would you look at that and see whether extras are attached to the contract or are listed on the top?

A Yes, the extras are attached to the contract.

Q Does that refresh your recollection that the contract that you saw or at least some of the contract that you saw between -- I mean for the building of a house did list extras of some kind or another?

A These two would so state.

Q Aside from these two, does that refresh your recollection?

A No, sir.

Q It does not, it is then still your testimony that with respect to the vast number of contracts you saw, they did not list extras?

A The best of my recollection.

Q Now, in these two instances, for example, where there were extras, and you saw the contract, what was your function with respect to preparing a record of any kind with respect to the extras?

A I cannot recall.

Q Well, one thing we know, you sent out letters?

A Yes.

Q All right. And those letters, as we see, listed in detail the extras that were ordered, as far as you knew, by the buyer; is that right?

A Yes, sir.

Q Now, where did you get that detailed list of the extras that you put on those letters?

A To my recollection, from Mr. Hornberger.

Q In what form? Do you understand the question?

A Yes. You are asking me if he wrote something down or he verbally told me?

Q Well, I mean --

THE COURT: Well, if you recall what happened, in what form?

THE WITNESS: I cannot say.

THE COURT: All right.

Q For example, in these exhibits that the jury just saw, 38A, which involves Mr. Metz's home, one extra ordered there and then here are some others, kitchen sink, which is 38C, recessed outlet for a clock on the wall, and a basement, an outside outlet at the front stoop and several others?

A Yes.

Q Here is 38B with a whole list of one, two, three, four, five, six, seven, eight, nine, with the prices.

Where did you get all those from?

A I would get this from Mr. Hornberger, in one form or another.

Q Are you sure that you didn't get them from a contract?

A No, I am not sure.

Q All right. You could have gotten them from the contract or you could have gotten them from Mr. Hornberger, in some form or another?

A Yes, sir.

Q So that you had a list, an itemized list, of the extras that were ordered or supposedly ordered by the buyer?

A For each home, yes.

Q Were you to follow it up to make sure that he accepted it or she accepted it?

A Yes.

Q So you had a binding agreement; is that correct?

A Yes.

Q Then you were to follow it up to see that they paid it?

A Yes.

Q And you did both those things?

A Yes, sir.

Q Now, when you received the list of the extras, was it at that time that you made out an index card listing the extras?

A The index card would not necessarily list the extras. Would list the amount that I was anticipating.

Q Well, you say, "not necessarily." What's your best recollection? Did you put down --

A I think I just put the amounts down.

Q Was this because you had a sufficient record in the letter that -- in the letter that you sent out?

A Yes, sir.

Q And these letters that you sent out, where were they filed? That is, the copies?

A To the best of my recollection, in the customer's file.

Q In a job file?

A I don't know.

Q Oh, I'm sorry. I thought you ment the customer's file. I was using -- I thought you ment by "customer's file," the job file. Was I wrong about that?

A I don't know. I have asked to see a copy of the so-called job file so that I would know what we were referring to.

MR. BENDER: I'll move to strike it out, your Honor.

THE COURT: Strike it out as not responsive.

Q In any event, your best recollection is that you put the copies that you sent out into a customer's file?

A Yes.

Q And by the "customer," you mean the person who ordered the building of the house?

A Purchaser.

Q And ordered the extras?

A Yes, sir.

Q And then you say you had an index card made out?

A Yes.

Q That was as a reminder to you to follow up to get paid?

A Yes, sir.

Q Now, would you tell this Court and jury -- withdraw that.

You also told us there were times when Mr. Hornberger would come over to you and say, "Look, I haven't been -- we haven't been paid for the extras, please get after these buyers"; is that right?

A Yes, sir.

Q And were there times when Mr. Hornberger told you, "I received a check, I have been paid by the buyers."

A Yes, sir.

Q Why did he tell you that? Why did he tell you --

THE COURT: Objection sustained.

MR. BENDER: I am sorry.

THE COURT: I will take conversations.

MR. BENDER: Your Honor, this I thought was cross.

THE COURT: I know it is.

MR. BENDER: All right.

Q Did Mr. Hornberger --

THE COURT: You may ask, do you know why he -- said anything.

MR. BENDER: No. I'm sorry, it was my mistake, your Honor.

THE COURT: Go ahead.

MR. BENDER: I apologize.

BY MR. BENDER:

Q You've told us that Mr. Hornberger told you when a check was received by him about which you may not have been aware for the extras on a letter that you had send out --

A Yes, sir.

Q By the way, did any of the girls in the office, when you were there, receive checks directly from the buyers for the extras? From the customer?

A Not to my recollection.

Q Did any, to your recollection, any buyer walk in on any day, after you had sent him a letter, requesting that he pay the extras to Mr. Hornberger and said, "I'd like to see Mr. Hornberger," or "Who shall I give this check for the extras to"?

A If they came in to see Mr. Hornberger --

Q Excuse me. Not "if." I only want your recollection.

Did you -- do you recall any instance in the

two years, 19 -- I mean the year and two months that you worked there, when a buyer walked in after you --

A Not to my recollection.

Q Not to your recollection.

Now, you knew -- withdraw that.

Did you give the copy of the letter that you sent out for the extras, which you say was put into the customer's file, to anybody else in the office, to put in the file?

A No.

Q Did you yourself physically put the copies of the letters that were sent out?

A Yes.

Q And did you also acknowledge receipt of the payment by the customer for the extras paid to Mr. Hornberger?

A By letter, yes.

Q Yes. How did you happen to do that?

A I was so instructed.

Q Was this a matter of policy?

A Yes, sir.

Q In other words, as to every time an extra was paid that had been ordered and was paid to Mr. Hornberger, a matter of policy in the office was that you were to send out a corporate letter; is that right?

A Yes.

Q Acknowledging receipt; is that correct?

A I think -- to my recollection, it was standard procedure.

Q Yes. Now, did you tell the bookkeeper, Miss Colletti, that the extras were paid?

A No.

(continued next page.)

CROSS-EXAMINATION

BY MR. BENDER (Cont'd):

Q Did you make any record in any ledger or any book that the extras had been paid?

A No.

Q Do you know whether any of the extras that were included in the extra price were reported or ordered in the books as income?

A No.

Q Do you know whether any of the extras which you knew were paid were recorded by you or somebody in the office as having been received other than in the letters that you spoke of?

A Not to my recollection.

Q Not to your recollection?

Q No.

Q Did you speak to Mr. Hornberger about that?

A When I was employed there? Yes.

Q Did you ever tell him that extras that you were receiving should be given to the bookkeeper?

MR. RYAN: Objection.

THE COURT: May I have that question?

(Question read.)

THE COURT: Overruled. I will allow it.

Q You never did?

A No.

Q You never did?

Now, youknew the extras were corporate income, didn't you?

A I didn't question it. My function was secretary.

Q You did not question it? Your function was a secretary, but your function was to see that the extras were agreed to and paid for; isn't that right?

A Yes.

Q You knew that Mr. Canale was the accountant, did you not?

A Yes.

Q Did you know that Mr. Canale should have a record of the fact that extras were paid?

A I would assume that Mr. Canale would have a record of items paid for.

Q You assumed that?

A Yes.

Q All right.

Now, these index cards which you told the Court and the Jury that you made up with respect to the extras and about which you say you're not sure whether you put down the details or just the name and the amount, were

those index cards kept in the customers' files?

A No. It was on my desk.

Q Never put in the customers' files?

A No. It was a reminder to me to see that something was paid. When I would file the paper away in the file, folder, be out of mind. This would be something on my desk to refer to.

Q Did you mark on the index card "Extras paid"?

A I would say I threw it away without writing.

Q No. Excuse me.

A Yes, sir.

Q When you received payment or you found out that payment had been made, did you mark anything on the index card with respect to payment received or anything like that?

A No.

Q But you believe that you destroyed those index cards?

A Yes.

Q This was on your own volition you destroyed them?

A Yes.

Q Nobody told you to?

A No.

Q Now, Miss Waugh, do you -- I think you testified

that the extras -- withdraw that.

The letter sent out for the -- by you for the corporation to the buyer -- I should use the word customer, excuse me -- for the extras, usually occurred whtn the building began?

A Yes.

Q And I think you told the -- told us that -- that the extras were agreed to or you tried to get the buyer to agree to them before they were done; is that what you --

A Yes.

Q Now, with respect to the payment, do you know whether the payment was requested before the [redacted] actually closed, when titled passed, rather?

Do you understand me?

A No, because you said contract and then you said title.

Q Yes, you're right. I confused you. I withdraw the question.

Do you know whether the general policy was, as Mr. Ryan was asking you, to try to get the payment of the extras before titled passed?

A Yes, sir.

Q Did you know the reason for that?

A It's that the bank does not want to be held

up during title and you settle all your punch lists and your extras before you go to title. This is general procedure.

Q Is this from your experience during this period of time that if you have a hassle over the extras at the time of the closing, the title, you just generally don't close titled; is that your point? Or delays the closing?

A It delays and wastes time.

Q Yes. And do you know whether also at the same time that obtaining the extras, payment of the extras, provided an additional operating fund for the corporations also?

Do you know whether that was another reason? In other words, it gave the corporations money?

A I don't know. It was -- it was income, yes.

Q Before it was built; isn't that right?

A Yes.

THE COURT: Wait. What was right?

Better go over the questions once more.

MR. BENDER: Excuse me. Withdraw that. I'll try it this way.

Q Do you know whether another reason why Mr. Hornberger wanted the extra monies paid into the coropration, before the work was done, was to have additional funds?

A I don't know.

MR. BENDER: Excuse me one minute, your Honor.

I have no further questions.

(Continued on next page.)

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REDIRECT EXAMINATION

BY MR. RYAN:

Q When you mentioned that you noticed there was some correspondence prepared by Sophie Pace, tell us what you are referring to.

I show you 28-B.

A Acknowledging receipt.

Q You are pointing to initials typed on the correspondence?

A Yes.

Q What initials?

A S.F.P.

AQ On occasion she would do correspondence, too; is that it?

THE COURT: Do you have any --

THE WITNESS: It must have been when I was on vacation.

THE COURT: Do you have any knowledge from what occurred aside from what you are seeing?

THE WITNESS: No.

THE COURT: Did you ever see this?

THE WITNESS: During February I always was on vacation. Someone would have to do the work.

THE COURT: I see.

MR. RYAN: Thank you.

Q The customer, the index cards, when you left in February, 1968, did you have any index cards left for extra payments due?

MR. BENDER: Mr. Ryan, I can't hear the witness, I'm sorry.

Could we have the question?

MR. RYAN: I'll repeat it.

THE COURT: Mr. Rudolph, please.

BY MR. RYAN:

Q When you left in February, 1968, did you have any index cards left for extra payments due?

A They would have been on the desk, yes.

Q Have you ever seen them since you left?

A I have not returned to the office.

Q When you mentioned customer files in response to Mr. Bender's questions, what were you referring to, what records in the office?

A I really don't know. I must have filed correspondence somewhere.

Q In a folder somewhere?

A Yes.

Q And was there any particular term used for those folders in the office?

A Not that I can recall.

Q All right.

Have you ever seen any of those files since you left?

A I have only seen the letters presented to me.

Q Just the correspondence?

A Yes, sir.

MR. RYAN: No further questions.

THE COURT: Anything further?

MR. BENDER: Yes, your Honor.

RECROSS-EXAMINATION

BY MR. BENDER:

Q Miss Waugh, didn't you tell us on your direct examination that you destroyed those index cards?

A As I would receive payment.

Q Yes.

A Yes.

Q And what ones were left over, did you say? The ones that may not have been paid?

A Yes.

Q Do you remember how many they were or what they were?

A No, sir, I don't know how many customers were left.

Q You mean you just left them on your desk?

A Yes.

Q You didn't turn them over to another girl?

A No.

Q You didn't turn them over to Mr. Hornberger?

A No. Everything was left on my desk.

Q Do you know how many they were?

A No, sir. Whatever contracts he had in existence.

MR. BENDER: I have no further questions.

THE COURT: Mr. Ryan?

MR. RYAN: Thank you.

THE COURT: You may step down, thank you.

(Witness excused.)

THE COURT: Next witness.

MISS WAUGH: You want these?

MR. RYAN: Thank you.

THE CLERK: Would you come forward, please?

(Continued on next page.)

R I T A P E R R I N I , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. RYAN:

Q It's Mrs. Perrini; is that right?

A That's right.

Q Did you ever work for Elmer E. Hornberger?

A Yes, I did.

Q When did you begin working for him?

A August of 1968.

Q And you still work for him?

A No, I don't.

Q When did you leave his employ?

A February of 1970.

Q When you were employed by Mr. Hornberger during 1968, can you tell us what your function was in the office?

A I was what you call a Gal Friday. I did secretarial work. I ran a few errands, typing, stenography, filing.

Q Did you have anything to do with extras?

A Yes.

Q What did you have to do with extras? Tell us generally your procedure, part of your job?

A My job was to send out the letters to the home owners requesting the money for the extras before they closed.

Q And do you recall whether the letters stated the manner of payment for the extras?

A In which it was to be paid, you mean?

Q Yes.

A Yes. A check to be made out personally to Elmer Hornberger.

THE COURT: Can you speak a little louder, please? Try speaking louder than normal.

THE WITNESS: Sorry.

Q Now, who told you to do -- make these letters out stating that the checks were to be payable to Mr. Hornberger?

A The girl that broke me in.

Q Who was she?

A Jean Bowman.

Q Now, did you have anything to do with the [illegible] receipt of the payments for extras?

A Most of it was done by mail.

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(Continued on next page.)

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Q Would you like a drink of water?

A No.

Q Did you ever handle the monies that would come in in payment for extras?

A Most of it was done by mail.

Q What do you mean by that?

A Well, we'd send a letter to the homeowner and they would answer by mail and I didn't open the mail.

Q Who did?

A Mr. Hornberger.

Q What would be the next thing that you would do after a buyer would send in a payment -- you never saw the check, correct?

A If it was made out to the wrong person.

MR. BENDER: I didn't hear the answer.

Q Would you repeat the answer --

THE COURT: Would the reporter please repeat it?

(Answer read.)

MR. BENDER: I object, two questions in one, and ask the answer be stricken.

THE COURT: May I have the question and answer again?

(Testimony read.)

THE COURT: Objection sustained.

Strike out the answer. The Jury disregard it.

Q How did you know payment was made for the extras?

A I was told by Mr. Hornberger.

Q He would tell you?

A Yes.

THE COURT: Are the jurors having difficulty hearing?

If any of the jurors do not hear any answer or any question, please raise your hand and I will have it repeated. It is vital that every juror hears every question and every answer.

Q Now, how did you know whether payment had been made for extras?

A Mr. Hornberger would come out and tell me so-and-so paid.

Q Now, did you ever see any of the checks that these buyers had sent in for extras?

A I would see a check -- it would be given to me only if it was made out to the wrong person.

Q All right, would you explain to us what you mean by that.

A By that I mean in the letter I had sent to them I would ask them to make a check out personally to

Mr. Hornberger and instead of that they would send it -- the buyer would send it to Mr. Hornberger, but payable to the corporation. In that case I would get the check and return it with a letter to the buyer.

Q Stating what?

A Please make this check out personally to Mr. Hornberger.

Q You started August of 1968, correct?

A Yes.

Q Can you tell us on approximately how many occasions you were given checks payable to the corporation by Mr. Hornberger?

MR. BENDER: Excuse me, 1968?

MR. RYAN: We will take 1968.

A Offhand I couldn't say -- I really couldn't say.

Q Could you tell us whether fifty, ten, five?

A I would say between three and six maybe in '68.

Q On those occasions, did you have any conversation with Mr. Hornberger about these checks sent in for extras payable to his corporation?

A Just that it was made out to the wrong person.

Q No further discussion?

A No.

MR. RYAN: Thank you, no further questions.

CROSS EXAMINATION

BY MR. BENDER:

Q Miss Perrini -- Mrs., I am sorry.

As I understand it, you sent out the letters to the buyers for the extras; is that right?

A Yes.

Q Now, who else was working in the office with you in 1968 -- do you remember?

A Yes.

Q Who else? Was Jean -- what's your recollection?

A Jean Bollman was the girl that broke me into my job to tell me how to do it and Vicky Coletti. At that time there were no other office girls.

Q As far as you can recall, it was standard procedure when you were there in 1968, when extras were ordered by a buyer, to send out a letter as a matter of course on corporate stationery to the buyer telling them to acknowledge the ordering of the extras and to make the check payable to Mr. Hornberger personally; isn't that right -- that was standard procedure?

A Yes.

Q All you girls knew that at the time; isn't that right?

A I believe -- the ones who typed the letters knew

it.

Q Certainly Jean Bollman knew it?

A Yes.

Q Vicky Coletti knew it?

A She didn't type the letters.

Q Did she know it?

A I don't know what she knew.

Q But you knew it?

A I knew, yes.

MR. BENDER: I have no further questions.

MR. RYAN: Thank you.

THE COURT: You may step down.

We will take a short recess. Have your next witness ready.

(Recess taken.)

THE COURT: You may continue.

MR. BENDER: Excuse me, your Honor. I do not see the defendant.

THE COURT: All right, we will wait for the defendant.

(Pause.)

Call your next witness.

(continued on next page)

Paterno-direct

GERTRUDE PATERNO, called as a witness, having been first duly sworn by the Clerk of the Court, took the witness stand and testified as follows:

THE CLERK: State your full name, please.

THE WITNESS: Gertrude Paterno, P-a-t-e-r-n-o.

THE CLERK: Be seated, please.

DIRECT EXAMINATION

BY MR. RYAN:

Q Mrs. Paterno --

A Yes.

Q -- (continuing) -- can you tell us your occupation, please?

A Bookkeeper-secretary.

Q Who do you work for?

A Thomas Canale.

Q What business is he engaged in?

A CPA and an attorney.

Q Where does he have his office?

A Main Street, Bay Shore.

Q Does he have any other secretary or bookkeepers in his office?

A No.

Q How long have you been working for Mr. Canale?

A It would be nine years.

Q Do you know Mr. Hornberger?

A Yes.

Q Did Mr. Canale represent Mr. Hornberger as an accountant?

A Yes.

Q And did you have anything to do with the accounting for Mr. Hornberger?

A I wrote for Mr. Canale --

THE COURT: You will have to speak a little louder. Speak louder than you normally do.

THE WITNESS: I write up the books for Mr. Canale in his office for his clients -- most of them.

Q I would like to ask you about the procedures you followed in writing up the books for the Hornberger account.

First of all, did Mr. Hornberger operate under a corporations, do you know?

MR. BENDER: Your Honor, I am going to object to two questions in one and I would like to confine this to '67 and '68, which are the years involved.

THE COURT: Would you please reframe the question.

Q Do you know whether Mr. Hornberger operated

under corporate names?

A I don't know if I am answering correctly. There were corporations -- the books were under corporations.

Q What were the corporations?

A The name?

Q Yes.

A Story Book Manor, Story Book Homes, Horn --

Q What did you do in writing up the books in your regular procedures in 1967 and 1968 -- will you tell us, please, as briefly and as simply as you can what would be the first step in any procedure that you followed in writing up books -- what information would be given to you and what would you do?

A I would have the checkbook and the bank statements available and I would write up the checks first all in the cash disbursements book, check by check, entering them into the accounts and then I would write up the cash receipts from the bank deposit slips and the checkbook and do a bank reconciliation and post it into the general ledger.

THE COURT: Did the jurors all hear that?

JUROR NUMBER TWO: I am having difficulty.

THE COURT: Please speak louder.

Q Now, I would like to ask you more specifics about that general procedure.

First of all, when you say you received checkbooks. For what accounts did you receive checkbooks?

A From the five corporations.

Q Did you ever receive any checkbooks from Mr. Hornberger's personal account?

A No.

Q Now, under your procedure, I'd like to ask you about recording receipts into the corporate bank accounts.

You made records of the receipts of money into the corporate bank accounts?

A From the bank deposit slips, you would enter it into cash receipts -- in the cash column and whatever account it belonged in.

Q Where would the deposit slips actually be -- the purpose of recording deposits into the corporate accounts?

A They would be in the checkbook.

Q The checkbook?

A Right.

THE COURT: Each corporation had a separate checkbook?

THE WITNESS: Yes.

THE COURT: You knew how to charge and credit each corporation?

THE WITNESS: Each had its own ledger.

Q When you say "deposit slips", do you know what a deposit receipt is?

A I should have said deposit receipt.

Q In the check stub book, how would you know what to do with a deposit of money -- how would you treat it? How would you make a record of what that represented?

A Whatever was marked on the deposit receipt.

Q Do you know who did the marking on the receipt?

A I can't say for certain. Whoever wrote up the checkbook in Mr. Hornberger's office.

Q I'd like you to take Government's Exhibit 129, it is for identification. Tell us if you recognize it.

A Yes.

Q What is it?

A Horn Enterprises.

Q What is it of Horn Enterprises -- what do you call the book?

A Well, I believe everything is in this book, the cash disbursements, cash receipts and the general ledger is in here.

JUROR NUMBER ONE: I can't hardly hear.

THE COURT: That is the closest juror to you.

Mr. Shapiro, would you please repeat the answer for the juror?

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(Answer read.)

THE COURT: May I suggest that you remain back of the lectern to encourage the witness to speak a little louder.

MR. RYAN: Yes.

Q With respect to monies received and deposited into the corporate accounts, were there any -- was there any categorization done or any allocation done about those deposits?

A Yes, most of them would be on jobs, so they would be credited to the job number.

Q How about any other deposits?

A Well, there would be possibly a Lilco check which would be charged to miscellaneous job expense or the bank loans, stockholder advance.

Q What do you mean "stockholder advance?"

A That would be Mr. Hornberger.

Q You'll have to explain to us what you mean when you say that would be Mr. Hornberger.

THE COURT: A juror didn't hear that. Please repeat the answer.

THE WITNESS: The stockholder advance --

THE COURT: May I ask that the answer be repeated by the reporter, because I am assuming if

Paterno-direct

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they did not hear you the first time, they won't hear you the second time.

(Testimony read.)

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Q What do you mean when you say that would be Mr. Hornberger?

A That would be referring to Mr. Hornberger. Mr. Hornberger had an account called "Stockholder Advance" that we'd enter whatever items we had been crediting or charging Mr. Hornberger.

Q Now, I would like to ask you about that particular item.

You have had an opportunity to look at Government's Exhibit 109 and 109-A, have you not?

A This part we looked at (indicating.)

THE COURT: Mr. Shapiro, would you read it again -- the answer only.

(Answer read.)

Q Would you be good enough to open up your book to the Stockholder Advance account.

What period of time does that cover?

A '67 and '68.

Q What corporation again?

A Horn.

Q Horn Enterprises?

A Right.

Q Now, when you received the check stub book, did you make any entries for the Stockholder Advance account in

the year 1967?

MR. BENDER: Excuse me, did you say near '67?

MR. RYAN: For the year, y-e-a-r, 1967.

MR. BENDER: I am sorry.

A Yes, I did.

Q Would you tell us the first entry --

MR. BENDER: Excuse me; your Honor. I think the books ought to be marked in evidence, if you're going to have the witness testify from the books. She hasn't identified it as a book in chief in which she made any entries.

THE COURT: Mr. Ryan is complying with the request, he is offering all the books of account.

MR. BENDER: May we have her qualified whether she made entries in the books?

MR. RYAN: I was trying to do that.

Do you want me to go back?

THE COURT: ARe these the corporate books of the various corporations?

THE WITNESS: Yes.

MR. RYAN: You looked at these books today with Mr. Canale?

THE WITNESS: Yes.

Q Are you satisfied these are the books that you

wrote up for Mr. Hornberger's corporation.

A Yes.

Q And did you have any doubt about it?

A I just looked at Horn, I assumed the others are the same.

Q Do not assume. I will show you the books.

THE COURT: Any objection?

MR. BENDER: I have no objection. I just want to make sure.

THE COURT: As to all the books?

MR. BENDER: I have no objection. We pr[illegible] the books.

THE COURT: There being no objection, let them be marked.

MR. RYAN: Very well.

MR. BENDER: I just wanted to make sure that these books have the year 1967 and '68.

THE COURT: You are consenting to the records for the years 1967 and 1968 and no other.

MR. BENDER: Thank you, your Honor.

THE COURT: If any other offer is made out of these books before or beyond those years, make the offer separately and I will consider it at that time.

MR. RYAN: Thank you.

MR. BENDER: Thank you.

THE CLERK: Government's Exhibits 128, 129, 130, 131, 132 and 133, previously marked for identification, now marked in evidence.

Q Now, I would like you to tell us about the first entry you made into the Stockholder Advance account and how you made it -- what information was that based on, what entries you made in connection with it.

A Well, first of all, there are checks and deposits.

Which ones do you want?

THE COURT: A juror did not hear it again.

MR. SHAPIRO: Would you please read it.

(Testimony read.)

Q Deposits.

A The first figure was at the period ending April 30, 1967 and the amount is $19,909.60.

Q Stop right there.

Now, what information did you base that entry on?

A That's the total figure for the period up to April 30th. There are several items --

Q I want the specific items.

Do you have an entry in that book for January

10, 1967 for $1,000.00?

A Yes, that's the first one.

Q Now, before you made those entries into the books, what information did you receive upon which you made the entries from?

A The deposit receipt ticket or the check book had said either EEH or Mr. Hornberger -- it was marked that way.

Q This would be a deposit receipt?

A A bank deposit receipt.

(Continued on next page.)

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Paterno - direct

Q And it would indicate $1,000?

A Yes.

Q And it would have some identification next to it?

A It would be written on there, yes.

Q What would be written on it?

A That particular item either was written EEH or Mr. Hornberger Stockholder Advance.

Q Have you seen those deposit slips and checkbook stubs since you made those entries? Have you ever seen them again?

A No.

Q Now, what were you told to do when you came across the deposit slip with that kind of an entry?

MR. BENDER: I object to that.

THE COURT: May I have the question.

(Record read.)

THE COURT: Sustained as to form.

Q What were you told to do if anything when you came across a deposit slip with the entry EEH?

MR. BENDER: Objection.

THE COURT: Sustained as to form. It calls for a conclusion.

Did you ever have a conversation with Mr. Canale

or Mr. Hornberger concerning how you would treat entries on the deposit receipt that indicated an advance, EEH or Hornberger?

A Well, when I first worked for Mr. Canale and he instructed me on every client that I would write up books for, he would of course go over it with me before I would start, and they would be the instructions.

THE COURT: Did Mr. Canale tell you how to treat the Hornberger account then?

THE WITNESS: Yes, everything.

THE COURT: All right, go ahead.

Q What was the first entry made after you saw the deposit slip with the $1,000 and the notation such as EEH?

A I didn't hear the first part of that.

Q What was the first entry you made in the book before you when you saw that deposit slip stating $1,000 with the initials EEH?

A Well, first of all, there is a cash column, and $1,000 would go into the cash column. Then it would also go into the Stockholder Advance column.

Q Now, are you pointing to the first entry that you made?

A Yes.

Q I have a blue pen here and I would like you to

initial next to the $1,000 entry --

MR. BENDER: I would object to it.

THE COURT: On what ground?

MR. BENDER: On the ground this is a mutilation of a book or record.

THE COURT: I will allow it. And the record shows the reason for the mutilation.

Just note for the purposes of this trial, and initial in red crayon, the entry that you just referred to. Put your initials there.

Every marking on the exhibit is a mutilation. We mark the outside of this with an exhibit number.

MR. BENDER: The original document, your Honor, but I am guided by what you say.

THE COURT: It is not irrevocable. The records are there. Anyone who reads them can see them. And it is explained by the record. The Court directed it. All right, next.

Q Now, that is the first entry you made about the deposit of the $1,000 into the Horn bank account? Correct?

A Yes.

Q Now, what would be the next step that you would follow in the book? What would you do with respect to the recording of that $1,000 --

A It would go into the general ledger.

Q Explain to us what you mean by the general ledger?

A Well, this first of all are the cash receipts, and the checks are cash disbursements. And then at the end of the period, when you are doing your job of reconciliator, of reconciliation, you total all these figures. And then those totals are posted to the general ledger where the accounts are.

Q The accounts with the categories of each item are correct?

A Yes.

Q Now, I would like to just concentrate on cash receipts for the moment. We are talking about a receipt of $1,000 into the corporate bank account? Correct?

A Yes.

Q After you made the entry in your book that the corporation received $1,000, what would be the next step in your procedure for making an entry in the ledger?

MR. BENDER: Excuse me. With respect to the $1,000?

THE COURT: I assume it is with respect to the $1,000.

MR. RYAN: I am using that as an example.

THE COURT: Strike that out. The jury will disregard that statement by Mr. Ryan.

Please try to answer the question.

THE WITNESS: What was that question?

THE COURT: Mr. Simon?

(Record read.)

A Well, I think I would have to repeat myself. This is posted to the general ledger.

Q Well, we would like to know in simple terms if we can, so will you tell us what were the next problems, if there was one? Was it defined a proper category for the $1,000?

A No, it was already in a category. We had it in Stockholder Advances. That is when it would be posted --

Q In other words --

MR. BENDER: I didn't hear the witness, your Honor.

THE COURT: Mr. Simon, will you repeat that please?

(Record read.)

THE COURT: Will you please try to shout. I am sure it won't be offensive to us and we may be able to hear it. Don't be concerned about speaking too loudly.

Paterno - direct

Q All right, now will you turn to the next entry you made in the book in sending that $1,000.

THE COURT: Did you then show under Stockholder Advances that on a certain day a $1,000 advance was made by Mr. Hornberger to the corporation?

THE WITNESS: Well, actually it wouldn't go in as $1,000. It would go in as the total at the end of April --

THE COURT: So for that period you put a figure in of more than $1,000. That included the particular advance that Mr. Ryan referred to, is that right?

THE WITNESS: Yes.

THE COURT: All right, next question.

Q And the other deposits which make this total at the end of the quarter also represent deposits into the corporate account with notations such as EEH?

A Yes.

Q Now, can you tell us from the book before you how much monies were advanced by Mr. Hornberger to the Horn Enterprise bank account for the year 1967?

A $60,305.23 for 1967. I am sorry. I am mistaken, because it already has a balance from I assume before.

Q All I want to know is how much was deposited during the year 1967 with these entries EEH and, therefore,

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Paterno - direct

placed in the Stockholder Advance account.

MR. BENDER: Referring to this one corporation, that is, Enterprise.

MR. RYAN: At this time.

A I would have to add up the figures with an adding machine.

Q Would you read off the figures for us?

A $19,909.60, $2,500.00, $2,000.00, $2,000.00, and this is a journal entry (indicating) $1,500.00.

Q That doesn't refer to a deposit?

A No.

THE COURT: Would you like to add them up? We are only talking about 1967.

THE WITNESS: Yes, including the journal entry it is $27,909.60.

Q Now, in your categories that you had for treating deposits of money into the corporate bank account, did you have any category for extras?

A No.

May I just say something?

Q Go right ahead.

A It most likely would have been under the job number and woulnd't have a category for extras of its own.

Q But it would have to be deposited into the

corporate account for you to pick it up? Right?

MR. BENDER: I will object to that.

THE COURT: Overruled. I will allow it.

Q Were you ever given --

MR. BENDER: What was her answer?

THE COURT: Will you read that, Mr. Simon?

(Record read.)

A That is the only way I could pick it up.

Q Were you ever given any personal bank account records of Mr. Hornberger?

A No.

Q None whatsoever?

A No.

Q Or any information related to it?

A No.

MR. RYAN: I have no further questions.

THE COURT: Mr. Bender?

CROSS EXAMINATION

BY MR. BENDER:

Q Mrs. Paterno, with respect to the same book, Government's Exhibit 129, which is that book before you, you referred to entries which you posted into the cash account of Stockholder's Advances of some $19,000 representing entries from January 1967 to the end of April, 1967. Do you

recall that?

A Yes.

Q Now, are there any indications in the cash column as to just what those deposits represented or what those entries represent? Is there anything in the cash column itself?

A On the books?

Q Yes.

A No. The cash column itself is just the actual deposit. Then we break it down to the account --

Q Yes?

A And those items that you are mentioning are in the cash column and then also under the account of Stockholder Advances.

Q Well, now, you mentioned the fact to Mr. Ryan that those five or six entries for the first quarter of 1967 were EEH advances or EEH or Mr. Hornberger. Do you recall that?

A Yes.

Q Take the entry of February 16, 1967 for $5,000. Do you know what that was? Do you know what the source of that entry was, what its nature was?

A It was marked on the deposit slip, as I have said, either EEH, Hornberger, and then it also said note.

Paterno - cross

Q Note?

A Yes.

Q N-o-t-e?

A Yes.

Q What was that, a promissory note?

THE COURT: If you know.

THE WITNESS: No, I don't. I had probably questioned it at the time and that is the reason the word "note" had appeared --

Q Excuse me, could you explain to us what you mean -- why would a note -- would that mean that a note was deposited to the corporate account, a promissory note?

A No. I would only have seen the deposit receipt. But it must have had a notation on their, either EEH, note, or Hornberger, note.

Q In other words, this was not clearly a check from Mr. Hornberger's bank account, personal bank account, deposited in the Horn Enterprise corporate account.

(Continued on next page.)

A Well, actually in all these instances I wouldn't know whether they were checks or whatever, how they were deposited. I wouldjust know according to the information, whatever was listed on the deposit, tosee if it said Hornberger or EEH, and I would credit the stockholder advance if there was no further information.

Q You have no notation next tothe $1,000?

A No.

Q Is it yourtestimony that you are assuming that the source of that entry was some notation on either the deposit receipt orthe back of the check stub book which had EEH or Mr. Hornberger?

A The $5,000?

Q No, the $1,000?

A Oh, the $1,000, yes, otherwise I wouldn't have put it; I would have questioned it.

Q Youalso after the $5,000 entry have the $1,800 entry, is that right?

A Yes.

Q You have no notation as to what that is at all, have you, next to that entry, what the source is?

A It is in the stockholder advance account.

Q Yes.

A That is the only way -- that is how we

classify it according to the account.

Q You credit it to the stockholders advance account?

A Yes.

Q But you don't know specifically what the nature of that source is, do you, whether it is a promissory note or a check deposited --

THE COURT: The method of advance you are talking about?

MR. BENDER: Yes.

A That would be true of all deposits. We just go according to what is written on the deposit receipt.

Q Well, at least with respect to the $19,000 that you referred to were there differences, if you know, in the source of those deposits?

THE COURT: I will sustain objection to that. I don't think it's clear.

MR. BENDER: All right. I will try to make it clear.

THE COURT: Source I think is the wrong word.

Q (Continuing.) The nature or the kind --

THE COURT: THe nature or kind of payment into the corporate account.

MR. BENDER: Exactly. I will accept that.

I appreciate your Honor's statement.

Q (Continuing) Doyou understand?

A Can I ask something --

THE COURT: No. If you can't answer it say you can't answer it.

Q Let me give you an illustration. You told us that the $5,000 which is entered in the stockholders advance of Enterprise of February 16th, 1967 bears the notation next to it "Note"?

A Yes.

(Continued on next page.)

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Q All right. You have nothing next to the $1,000 entry?

A Right.

Q You have nothing next to the $1,800 entry?

A Yes.

Q Which is February 24, 1967?

A Correct, yes.

Q You then have another entry of $4,000; do you not?

A Yes.

Q And that's dated March 7, '67?

A Yes.

Q And that's -- what notation do you have next to that?

A Transfer.

Q Transfer?

A Yes.

Q What does that mean?

A To mean -- it must have been written on --

THE COURT: No. Do not speculate.

If you know what it means, then say so. If you did nothing more than copy the language or words that were on the deposit slip and you know nothing more about it, why then say so. I do not want you guessing about what it could be.

THE WITNESS: Well, that is true. I really didn't know what it was. If it said -- it said either Mr. Hornberger, KEH or Stockholder Advance, but it always said transfer. That's why I put down transfer.

Q All right.

A The fact that it said "Mr. Hornberger", that's why it went into the Stockholder Advance account.

Q All right. Now, the next one, which is $8,189.60; is that right?

A Yes.

Q Dated 4/27/67?

A Yes.

Q What was that?

A That went into Stockholder Advance.

Q What was it?

A That I don't know. It could have been a salary check.

Q What does -- do you have any description next to that?

A No. That's true of all -- you don't put a further description. You classify it -- classifying it in its proper account is the description.

Q Excuse me. I didn't mean to cut you off. Go ahead. Finish.

A That was all I was going to say.

Q Were you familiar with the practice of Mr. Hornberger turning back his salary checks to the corporation?

A They have -- I see that they are on the books. They have been deposited, but as you are working with the books, you don't go back and look at each individual -- each salary check and then trace it to see if it was deposited. I go according to what's written on the deposit received. For me that's my authority to put it into the account.

Q Yes. Now, Mrs. Paterno, his Honor had asked you a question before, when we were laboring under who gave you instructions, as to how to handle these entries in the Stockholders Advances, and went to enter them, and his Honor asked you whether you received instructions from Mr. Hornberger or Mr. Canale; do you remember?

A Yes.

Q And you answered that you received instructions from Mr. Canale?

A Yes.

Q You never received any instructions from Mr. Hornberger; did you?

A No, never did.

Q Now, do you recall whether in addition to -- withdraw that.

Do you recall whether or not you received a checkbook of the corporation or anyone of the corporations and a bank deposit receipt which listed a deposit to the corporation but had no EEH or EEH Advance or Mr. Hornberger on it? Did you?

A In other words, no identification at all?

Q That's right.

A Yes, surely.

(Continued on next page.)

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Q Did it happen frequently?

A Well, not as frequently as checks that were not listed according to job numbers. That had to be broken down. But there were deposits, I am sure.

I can't really say if it is in Horn Enterprise, but from time to time there were deposit slips that were not identified at all.

Q Please keep your voice up. The jurors are very anxious --

THE COURT: To make it easier, Mr. Bender, if you took a position at the lectern, the witness wouldn't turn her head away from the jury.

MR. BENDER: Surely, your Honor.

Could we have the Reporter reread the witness' answer, your Honor?

(Question read.)

BY MR. BENDER:

Q For a moment let me stay with that.

You mean that when you received the checkbook stub or the checkbook stubs of one of the corporations, and/or the deposit receipt, the source of the deposit would not have a job number down, unless it was money received in connection with the particular job? Is that right?

A Well, I wouldn't know what the source was

but if there was no identification at all on the deposit slip, we would put it in an accout called suspense.

Q Excuse me, Mrs. Paterno, what did you mean by a job number?

Were you familiar with the way the -- the contracts were handled by the various corporations on the building of homes, at least as to identification? Or the category?

A They would be listed according to job numbers. Possibly sometimes they would also have building loan and the name, but we would -- we only list it according to job number.

If there is a job number.

Q You list it in the Horn Enterprise book, for example?

A Yes.

Q Government's Exhibit 129, the job number?

A Yes.

Q What else did you list with respect to that?

A To the job numbers?

Q Yes.

A Also the checks.

Q In other words, --

A The same way.

Q You had a ledger sheet or sheet in that book with respect to every single job in progress?

A Yes.

Q And every job completed?

A Yes.

Q Is that right?

A Yes.

Q And you kept a record in that book of all advances?

On that job and all disbursements on that job?

A Yes, true.

Q Now, with respect to your making an entry in that book, you say that there were certain times when there were deposits to the corporate account which did not identify the deposit as coming or relating to a particular job, is that right?

A Or relating to anything. If it was just a deposit slip, with no identification at all.

Q How frequently did that happen?

A That is hard to say.

Q Well, if you don't -- if it is -- if you can recall?

A On checks, like I say, there were a great

many checks that we had to put in suspense because they weren't broken down into job numbers.

Deposits I am sure there were some, but it is very hard to say how many.

Q Well, do you recall any instance where a payment was deposited --- received and deposited to the corporate account and when given to you, it was credited to the wrong job number?

A Would you give me the question again?

THE COURT: Mr. Rudolph.

(Question read.)

A I wouldn't have any way of knowing when I am writing up the books whether the job number that is listed on the deposit receipt, whether it is correct or incorrect.

THE COURT: No.

The question is, whether you now recall crediting a receipt to a particular job number and then learning later it was improperly credited?

Do you recall anything like that happening?

THE WITNESS: No, I don't.

THE COURT: All right.

BY MR. BENDER:

Q Do you recall -- withdraw that.

Now, with respect to these advances, the stockholder's advances, it is true that there were advances similar, not necessarily in amount, which you entered in the cash receipts and then posted to the general ledger, with respect to the -- to the other corporations as well?

A Yes. All the -- they are similar. All the ledgers.

Q There were additional advances, stockholder's advances?

A Yes. Right.

Each book is complete.

Q Represented by deposits to the corporations? In all the files, isn't that right?

A Yes.

Q Now, with resepct to the advances themselves, which you entered in these books, how frequently did you have deposits in the corporate accounts where either the checkbook nor the deposit receipt had any name like E.E.H. or stockholder's advance or anything like that? Or any notation?

I am not talking about these that you have entered in the stockholder's advances. Do you follow me?

A But you are talking about receipts now? Cash receipts, not checks?

Q I am talking about when you received from the corporate office the checkbook stubs of the corporations, and any and all deposit receipts, how frequently were there no notations at all to identify that deposit to the corporate account?

And yet, which you entered as a stockholder's advance to Mr. Hornberger?

A No, none of them that I entered on stockholder advance were not identified.

I only entered those that were identified as Mr. Hornberger. If there was no identification on the deposit receipt, it went into suspense account.

Q You mean, into a column which is called suspense?

A That is right.

Q And was this a column that you prepared at the end of the year? End of a tax year?

A No. As it was posted, it went into that account.

Q And what happened to it in suspense?

A Oh, I would make up the actual -- I would make up a list of the actual deposits and the checks because there were a good many checks, with the date of the deposit and the amount, and then Mr. Canale would take the

list over to Mr. Hornberger's office and he would get the answer on that.

Q Do you know who he spoke to?

A I assume it was Vicky that did the books at that time. I can't say for certain. 1967.

Q Well, now, you recall -- now, can you tell us how frequently was it necessary for you to enter in suspense account unidentified deposits to the corporate accounts which wound up in the stockholder's advance account?

A I don't really know that any of them did go into stockholder advance.

May I look at the expense acco nt? That is the only way I can really answer that question.

Q Oh yes, please. By all means and please tell us what book you are looking at so we all know.

A This is scill Horn, I believe.

Q Yes.

That is 129.

THE COURT: That is the Horn Enterprise ledger?

THE WITNESS: Yes. This is 1967.

I can't possibly remember without looking at the ledger.

BY MR. BENDER:

Q Let me ask you this question. Maybe I can shorten this. Is this correct?

That a minor number of entries contain notations, that is entries in the checkbook stub or in the deposit receipt, that a minor number of entries contain notations as to stockholder's advances while the remainder had no notations at all?

A I didn't hear the last part of that.

Q While the remainder had no notations at all? Is that a correct statement?

A I am sorry.

I didn't quite understand the statement.

Q With respect to deposits which were made into the corporate accounts, in 1967 and 1968, which you say you put into the stockholder's advance account, is it correct that only a minor number of the entries that reflected the deposits in the checkbook stub or in the deposit receipt, contained any notation that it came from E. E. H., stockholder's advance, noted as such, that the remainder had no notation on them at all?

A In other words, you are asking --

THE COURT: Sustained as to form.

The witness obviously doesn't understand

the question. First I will ask, can you recall any instance in the Horn Enterprise account where you credited the stockholder's advance, where there was no identifidation -- identifying marking on the deposit slip?

A THE WITNESS: Never.

BY MR. BENDER:

Q Do you recall being interviewed on March 22nd, 1973, by Special Agent Mazzella and Revenue Agent Valardi?

A I don't recall the date, but I recall the meeting, yes.

Q At that time did you discuss with them the postings to the stockholder's advance account?

A Yes, I believe we did, yes.

Q Did you tell them at that time that a number of entries contain notations as to stockholder's advances while the remainder had no notations at all?

A I am sorry but I -- maybe you are too far away from me, but I can't really exactly hear that question clearly.

To know what it is you are asking me.

THE COURT: Mr. Rudolph, will you please give it to the witness.

Listen very carefully.

MR. BENDER: May I mark this for identification?

THE COURT: Don't answer it unless you understand it.

THE WITNESS: Yes, because I don't really understand that question.

THE COURT: The one question is whether you hear it.

The other question is whether you understand it. We can only provide you with the hearing apparatus.

THE CLERK: Document marked Defendant's Exhibit G. for identification.

(Defendant's Exhibit G marked for identification.)

THE COURT: Did you just say that? That is the only question.

THE WITNESS: Read it to me again slowly.

THE COURT: Once more.

(Question read.)

THE WITNESS: I don't recall that I had said that, but can I say what it is?

THE COURT: No. That is the only question at this moment.

Q Can I show you G. for identification?

Would you just look at this and just see if it refreshes your recollection as all as to what you indicated at that interview?

And please don't read it. I mean, don't read it out loud.

A Don't read it out loud.

Actually, part of this is --

THE COURT: No, just answer the question.

The question is, does that refresh your recollection that that is what you told the agents?

A Not -- doesn't look exactly the way it appears here. Part of it really --

THE COURT: No.

Don't say anymore.

BY MR. BENDER:

Q Tell us what you did say.

A Well, the question at that time probably was for me to explain how the cash receipts were posted.

And the cash receipts, like I said, we -- I would post it from the bank deposit receipts and those that are marked job number, went into advances on jobs, under the job number.

Those that were marked E. E. H., Mr. Hornberger,

or stockholder advance, were credited to stockholder advance. Those that had no identification at all we put inot the suspense account.

And then of course, there are other accounts, like bank loans, miscellaneous expenses, possibly a telephone refund or whatever, but those are the main accounts and that is what I had said.

Q Very good. Now, with regard to any entry in the checkbook stub or in a deposit receipt which was marked just simply E. E. H., you assumed that that was a stockholder's advance?

A Yes, definitely.

Q And do you know how frequently that occurred that all that there was was the mark in the checkbook stub of the various -- of the corporate -- of whichever corporation it pertained to, where it was just E. E. H.?

A I could only refer back to the account. To see.

It is hard to pull out a figure from 1967 and say how frequently it is.

Q But the books do reflect that?

A Oh yes..

Q In other words, that would be whrere -- it would be listed in suspense?

A No.

Wasn't your question, if it was clearly marked E. E. H.?

Q Only marked E. E. H.?

A Only marked E. E. H., or Mr. Hornberger, it was true of checks as well as deposits, it would go in stockholder advance account.

Q It would go in automatically?

A That is right.

Q And you would not ask Mr. Hornberger what that was?

A No.

Q You just put it down automatically?

A That was my authority. What was the -- the markings that were on the deposit receipt was my authority to put it in stockholder advance.

I had no reason to question it otherwise.

MR. BENDER: I have no further questions.

BY MR. RYAN:

Q Mrs. Paterno, if you had the time, would you be able to point out to us each deposit that you recorded in your book, which was based upon a deposit receipt that said E. E. H., if you had the time?

A Surely.

Q All right.

Perhaps I will ask that that be done.

THE COURT: No statements.

MR. RYAN: Well, I am going to ask the witness to do that.

MR. BENDER: To do what?

MR. RYAN: But not now of course.

THE COURT: Well, we will suspend at this time for lunch.

I will ask the jury to return at ten minutes after two. It is an hour and ten minutes for lunch.

THE WITNESS: Does that mean I am finished?

THE COURT: No.

You may step down. You are asked to return at ten minutes after two.

The jury may be excused.

(The following occurred in the absence of the jury.)

MR. BENDER: What was it that you requested?

THE COURT: I am sorry. You were distracted for the moment.

I don't know that I would even have permitted the question.

MR. BENDER: What was the question?

THE COURT: Will you read the question and answer?

(Question read.)

MR. BENDER: I object to that your Honor.

THE COURT: Of course that is objectionable.

Strike it out. I will tell the jury to disregard it, but Miss Paterno is directed to return and, in the meantime, make the computations that the Government asks.

And expect to give the answers.

MR. BENDER: Make what computations?

THE COURT: What was suggested by Mr. Ryan.

I assume that you want to know the frequency with which --

MR. RYAN: The amounts.

THE COURT: And the amounts. Which advance -- stockholder's advances were made in all the corporations. Both years.

MR. BENDER: Your Honor, if this witness -- if I understand the witness, that is is clearly posted in the books, let the government's agents do that.

It is an exhibit in evidence.

THE COURT: That is one way.

MR. BENDER: Why should this woman who is working for an accountant and -- have to be here to do this for the Government?

THE COURT: Suppose Mr. Ryan decided to go through every book and ask that question to each corporation and then ask her to total it up, I would permit it.

Now, we are just going to save time by having her do it.

MR. BENDER: The Government has totals. The Government has had these books. They know what the totals are.

THE COURT: Do you have the totals?

MR. BENDER: Of course they have.

THE COURT: Why can't you agree with Mr. Bender on this and save a lot of time.

1 HS_BB AM - 1

MR. RYAN: If I should get the agreement --

MR. BENDER: I will be glad to give him an agreement.

THE COURT: If you agree, there are many matters that were testified to that were obviously ideal subjects for agreement. I do not know why testimony was taken -- why much of the testimony was taken. That you certainly can agree on. It is right in the books.

MR. BENDER: She has it right in the books.

THE COURT: All right, I will have to ask you to return at ten minutes after 2:00, so you can be excused before the jury if the agreement is reached.

(Luncheon recess taken.)

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AFTERNOON SESSION

THE COURT: Are you ready to stipulate, Mr. Ryan?

Is Mr. Bender ready to stipulate?

MR. RYAN: He is, sir. He wants me to make some corresponding entries. It is just a mechanical matter.

THE COURT: Have you stipulated to the facts to which Mr. Ryan was ready to ask questions on?

MR. BENDER: Yes.

All I wanted on this schedule that Mr. Ryan is making up on the total of the Stockholder Advances was to put down the exhibit numbers which referred to the checks which were deposited in the personal account.

THE COURT: Are you going to give that information to the jury now?

Is there any reason for holding up the jury?

MR. BENDER: We want to give you one other stipulation, which the Government I think would like to have.

(Pause.)

THE COURT: Gentlemen, I'm going to call the jury in. If you don't intend to ask any questions of Mrs. Paterno, I am going to excuse her. If it is

just a calculation, then you just make it.

MR. RYAN: I would like the witness to be excused.

THE COURT: Seat the jury, please.

Would you take the stand, Mrs. Paterno.

G E R T R U D E P A T E R N O, resumes the stand and testifies further as follows:

THE COURT: I sustained the objection to Mr. Ryan's question. I ask you to disregard the answer. Any more questions, Mr. Ryan, of this witness?

MR. RYAN: I would just like to state -

THE COURT: No statements, please.

DIRECT EXAMINATION

BY MR. RYAN (Continued):

Q Do you know the total amount of monies advanced by Mr. Hornberger from his personal account into the corporate accounts?

A No.

Q You could tell that from the record; is that right?

A From the records that I wrote up?

Q Yes.

A I'd have no way of knowing where they came from.

Q Right, but you know the total amount of monies

deposited that were attributable -- deposit receipts that had EEH.

A Whatever was put in the Stockholder Advance.

Q Offhand you don't know how much was treated as Stockholder Advances?

A In dollar amounts, no.

MR. RYAN: No further questions.

THE COURT: You may step down. Next witness, please.

(Continued on next page.)

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THOMAS J. CANALE, called as a witness herein, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

THE CLERK; State your full name.

THE WITNESS: Thomas J. Canale.

DIRECT EXAMINATION

BY MR. RYAN:

Q Mr. Canale, would you tell us your occupation?

A I am accountant -- Certified Public Accountant and an attorney.

Q How long have you been a Certified Public Accountant?

A About 15 years -- 16 years.

Q And you practice individually?

A Yes, I do.

Q How long have you been doing that?

A Since about 1958.

Q Prior to 1958 did you do any accounting work?

A I worked for a certified public accounting firm.

Q What was the name?

A Lybrant, Ross Brothers and Macomty. I worked for Holmes & Davis and for Suffrin & Finault.

2 Canale - direct

Q All right. Now, in the course of your practice as an accountant did you represent Elmer HOrnberger?

A Yes, I did.

Q Did he conduct his business in corporate names?

A Yes.

Q How many corporations?

A Basically five.

Q Would you tell us the corporations?

A Story Book Homes, Incorporated; Story Book Manor, Incorporated; Dotal Builders Corporation or Building Corporation, Horn Enterprises, Incorporated and -- was that five?

Q Four, you are missing one.

A Elpa Builders.

Q When did you begin doing accounting work for Mr. Hornberger?

A About 1959 or so -- 1958, 1959.

Q How about today, do you still represent Mr. Hornberger?

A Yes, I do.

Q With respect to the year 1967 and '68, would you tell us generally but briefly what your function was as the accountant for Mr. Hornberger?

A

3 Canale - direct

A To write up the books and to make tax -- prepare tax returns and final statements for the corporation.

Q Did you ever prepare his personal income tax returns?

A Yes.

Q I show you Government's Exhibit 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13.

(Shown to witness.)

Do you recognize those documents?

A Yes.

Q What are they?

A Tax returns for the various corporations?

Q What years?

A 1967 and 1968.

Q How about Mr. Hornberger's tax returns, are they in there?

A Yes, 1968, 1967.

Q Referring to Exhibits 4 and 5, correct?

A Right.

Q You prepared these returns, did you?

A Yes.

Q Now, I would like to ask you about the manner in which you prepared these returns -- first of all, what records did you have of income?

4 Canale - direct

A Cash receipts, book which was credit -- the deposits were credited to the various accounts.

THE COURT: When you say these returns, are you referring only to the corporate returns or do you include the personal returns?

MR. RYAN: I include the personal returns.

THE WITNESS: I didn't have books on the personal.

Q How did you determine the income there?

A Whatever he had on the W-2 -- the corporation used to pay him a salary -- any income under subchapter S -- any other income that he might have on the 1099 -- he might have on the 1099.

THE COURT: You are talking to a jury. When you talk about subchapter S, explain that and --

THE WITNESS: Subchapter S Corporation is a corporation which elects not to pay Federal Income Tax. In effect, the income that that corporation earns is picked up on the individual return and therefore there is not the double tax action of the corporation and the individual -- so on his personal return whatever income was shown to the corporation return for two of the corporations -- Story Book Homes and Elpa Builders was picked on his personal return.

5 Canale - direct

A 1099 would be a little slip that you get from a bank showing how much interest you earned during the year -- taxable interest.

THE COURT: When a corporation is in business, the corporation, like an individual must file an income tax return showing any income and expenses and taxable income?

THE WITNESS: That's right.

THE COURT: Under Subchapter S -- a business corporation must pay taxes on any profits it makes.

THE WITNESS: That's right.

THE COURT: Subchapter S corporation is different?

THE WITNESS: Subchapter S is different as that there is no tax. They elect not to be taxed as a corporation. Whatever the net income after expneses is added to the personal return of the individual who owns the stock --

THE COURT: Does a Subchapter S corporation have to file an income tax return?

THE WITNESS: It has to file a return.

THE COURT: What's the purpose --

THE WITNESS: It's an information return.

THE COURT: Just an information. Like a

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partnership would have to file an information return.

THE WITNESS: That's right.

THE COURT: Go ahead.

BY MR. RYAN:

Q Let me show you Government's Exhibit 4. That's the personal return for Mr. Hornberger for the year 1967, all right?

A Yes.

Q Can you tell us what the sources of income were that were listed on the individual income tax return?

A Salaries.

Q From what?

A From the corporation undoubtedly.

Q You determined that how?

A From the W-2 -- we would prepare payroll tax return -- whatever the payroll was.

Q From the corporate records?

A Right.

Q What were the other sources of income for the 1967 year?

A Since I don't have the whole thing here -- it would seem to be other income -- it would probably be the Subchapter S income basically.

Q And the Subchapter you are referring to a

particular --

A Elpa and Storybook Homes.

Q Where would you get the information to put on the return that he received income from those corporations?

A From the tax returns of those corporations.

Q Okay.

Where would you get the information to prepare the corporate tax returns?

A From the books and records of the corporation.

Q Now, you had a bookkeeper or a secretary working for you?

A That's right.

Q That's Mrs. Paterno?

A That's correct.

Q And she wrote up the books, in fact, correct?

A That's correct.

Q Under your direction and instruction?

A Yes.

Q And you are aware, are you not that there were monies Mr. Hornberger had advanced to the various corporate bank accounts?

A Yes.

Q And a record was made of these advances into the corporate bank accounts?

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A Yes. A record of all deposits were made, all disbursements, checks, notes, -- whatever.

Q All deposits into the corporate bank accounts there was a record?

A Yes.

Q Did you ever have any of the personal bank accounts of Mr. Hornberger?

A No.

Q Never?

A Never.

Q With respect to the monies that Mr. Hornberger advanced to these various corporations they were treated as stockholder advances?

A That's right.

Q Is that income?

A No.

Q Why not?

A Because it's a loan -- a loan to a corporation is not income.

THE COURT: Were you the one that directed that theybe described as stockholder advances?

THE WITNESS: I probably catagorized them -- as a catagory -- anything that is not income, your Honor, would be put into some kind of account that

would indicate what it was -- a stockholder -- we happened to call it a stockholder advance.

If an individual stockholder lends money to a corporation that's a stockholder loan or advance we call it.

THE COURT: Is an advance also a loan?

THE WITNESS: I suppose so -- it's semantics -- we could call it a stockholder loan -- my terminology is a stockholder advance.

THE COURT: Contribution of capital would never be an advance?

THE WITNESS: No, that would be capital stock.

THE COURT: All right, go ahead.

(continued next page.)

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Canale-direct

BY MR. RYAN:

Q At the time you would prepare the corporate income tax returns, would you take into account the stockholder advances?

A Well, at the end of the year -- the fiscal year which is the calendar year in all cases here -

Q That's December 31st, the end of the year?

A Yes.

Q Okay.

A My bookkeeper would give me a trial balance. One of the figures, of course, on the trial balance would be stockholder advances.

A trial balance is nothing more than a list of the balances in each account. Of course, the debits -- being a double entry system -- the debit s equal the credits.

Q When you talk about a balance in each account, you are not talking about bank accounts?

THE WITNESS: No, individual accounts like for each expense there would be an accoun t, for each income there would be an account, for each liability there would be an account, for each asset there would be an account -- of course -- one of the assets being cash.

Q Was there ever any discussion with

Mr. Hornberger concerning thesource of the advances deposited into the corporate bank accounts?

MR. BENDER: At what time?

MR. RYAN: '67 and '68.

A No -- probably not.

Q Nothing?

A No.

Q Are you familiar with the term extras in the industry?

A Yes, I am.

Q You represent any other builders?

A Yes.

Q In '67 and '68 did you have any discussion with Mr. Hornberger about extras?

A No.

Q Have you had an opportunity to ascertain how much was advanced by Mr. Hornberger to these corporations during the years '67 and '68?

A My girl prepared a schedule, you know, from the books what was advanced.

Q That is Mrs. Paterno?

A That's right.

Q Do you have the schedule?

A No, I gave it to Lou Bender -- Mr. Bender.

Q Do you remember what the total amount was??

A No, I would only be picking a figure out of the air. I couldn't say what that was.

Q At the end of the year, you told us that you balanced out the books?

A Mrs. Paterno would give me a trial balance.

Q Under your supervision?

A Yes.

Q Would you explain to us what the effect of this stockholder advance account is at the end of the year?

MR. BENDER: I object to that.

Q In simple terms --

MR. BENDER: I object to it.

THE COURT: Can you answer that question?

Do you understand the question?

If you understand it, I will allow it.

THE WITNESS: I understand the question.

Q All right.

A The balance -- whatever the balance was in there is what the corporation owed Mr. Hornberger.

THE COURT: Does the advance effect the net worth in any way -- in other words, the amount of the advance is a credit and isn't there a liability for the loans payable to the stockholders -- doesn't it

balance off?

THE WITNESS: Well, that's -- I don't think you are phrasing it right, Judge. This balance in this account is a loan of the individual --

Q To the corporation?

A Yes, on the corporation books it shows it as a loan.

THE COURT: Isn't it athe same as a stranger lending the money to the corporation?

THE W ITNESS: Yes.

THE COURT: Mr. Ryan wants to know the effects on the financial condition of the corporation.

THE WITNESS: As a balance sheet -- it would be a balance sheet item.

When you say "condition" it would be as a liability to the corporation, so it would effect the financial status of the corporation.

Q The corporation would owe Mr. Hornberger whatever the book showed he advanced to the corporation?

A That's right.

Q Well, can you tell us whether Mr. Hornberger was returned any of this money by the corporations?

A There were small withdrawals and certain items that were paid by the corporation, which was not tax

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deductible, would be charged to this account called the stockholders advance.

Q Would they be made by check out of the corporate bank accounts?

A If he paid out say a life insurance policy that he had, which is not deductible for corporate taxes, it had to be charged someplace. It was charged to this loan account or stockholders advance account.

Q Are you saying instead of sending the money back to Mr. Hornberger and having Mr. Hornberger write a check out for personal insurance premiums or something like that, the check went directly from the corporation for payment?

A Yes.

Q Let me show you the Horn Enterprises book, exhibit 129. Will you turn to the stockholder advance account.

(Document shown to witness.)

A Yes.

Q All right, have you got the appropriate page?

A Yes.

Q Says account number 240 on it?

A Yes.

Q From looking at that page, can you tell us how

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much was advanced by Mr. Hornberger tot he corporation during the year 1967?

MR. BENDER: Can we identify that particular page?

MR. RYAN: Says 240.

THE WITNESS: Yes, I have to do some computations.

Q Mr. Bender wants the correct page.

How would you refer to the page?

THE COURT: It is identified by the number.

THE WITNESS: Page 240.

What was the question now?

Q How much does that page show Mr. Hornberger advanced to the corporation, roughly?

A About $25,000 roughly.

Q All right now, did the corporation pay out --

A It has to be more. I am sorry.

THE COURT: Do you want some scrap paper?

THE WITNESS: AbouT 50,000.

THE COURT: You have scrap paper?

THE WITNESS: I have scrap paper.

Q Now, did the corporation during that year 1967 make any payments out of its bank accounts attributable to personal items?

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A Yes.

Q How much was paid out?

A There is a total here of 26,000, but there is a journal entry -- I'm not sure what that represents.

Q Can you tell us from looking at that record --

A I would say about 10,000.

Q Can you tell us from that record to whom the checks were payable?

A No, I would have to go to the cash disbursements book.

Q Is that in the book that you are looking at?

A Yes.

Q Could you?

A Yes.

Q You are referring to a particular check now?

A I am going to look for the check.

Q All right.

A Check for 250 made out to Elmer Hornberger.

Q Personally, 250?

A Yes.

Q Would you be good enough to pick out another check that was paid as a personal item out of the corporate bank accounts?

A Spray's Pharmacy, $31.20.

Q Would you be good enough to pick out another check that was paid --

A Spray's Pharmacy, 162.48, Lou 's Oil Company, 242.04, Lou's Oil Company, 67.62, Connecticut General Life, 902.50 -- that's the life insurance.

Q Do you have other entries there?

A Associated Hospital of New York, 53.58.

Q Was there a check made to the Bating Holly Country Club out of the corporate accounts?

MR. BENDER: What was that?

Q Bating Holly Country Club?

A Yes.

MR. BENDER: Excuse me, you mean out of the stockholder advance -- I am sorry.

THE COURT: One lawyer at a time.

MR. BENDER: You are right.

THE COURT: Do you have an objection to make?

MR. BENDER: No objection.

(Continued on next page.)

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DIRECT EXAMINATION

BY MR. RYAN (Cont'd):

Q Now, these items that you have just referred to, explain to us what you did with them at the end of the year with respect to the advanced money Mr. Hornberger made to the corporations?

A I didn't do anything with them. They would affect that account. They would determine what the balance in the account was.

THE COURT: It would reduce the account?

THE WITNESS: Reduce the account.

THE COURT: The corporation would owe Mr. Hornberger less because they paid his personal expenses?

THE WITNESS: Right.

THE COURT: All right.

BY MR. RYAN:

Q Okay.

Now, did you ever have a conversation with Mr. Hornberger concerning the recording of income? Yes or no.

A Yes. Probably.

Q When?

A We discussed it here recently. We have

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discussed it in 19 -- 1970 probably. I can't tell you exactly what dates they were.

Q Well, how about prior to 1967?

A I can't recall. I don't -- specifically I probably didn't discuss it with him.

MR. RYAN: Mark this document, please.

Grand Jury minutes, April 2, '74.

THE CLERK: So marked as Government's Exhibit 137 for Identification.

(So marked.)

Q I show you Government's Exhibit 137 and -- pages 14 and 15. Would you look at that, read it to yourself and tell us whether or not that refreshes your recollection?

Does it refresh your recollection? Those pages you have read; yes or no?

A Yes, I think that was -- yes. Yes. I probably said that.

Q Well, tell us what you probably -- tell us what discussions you had with Mr. Hornberger --

A I said I -- I think in here I say that.

THE COURT: No. Not what you said there. The question, Mr. Ryan --

Q Did you ever have a discussion with Mr. Hornberger about recording income?

3 Canale - direct

A I said -- I probably did have some discussion in the past. Because I've been doing business with him for 15 years. Maybe even prior to '67. We had to have tax -- the cash records, bank accounts, and you know, check stubs and the cancelled checks. And in a general sense I probably discussed it with him.

Q What did you discuss with him?

A That I needed these records in order to --

Q What records?

A His bank statements, his cancelled checks and his check stubs.

THE COURT: When you say "his," you are talking about his personal bank records?

THE WITNESS: No, no. The corporation.

THE COURT: The corporation's?

THE WITNESS: Corporation's.

Q You never had any discussion with him about his personal records?

A No.

Q He never showed you his personal records?

A Never.

Q Never asked for them?

A Never asked for them, no.

Q Were you ever aware of the fact that

Mr. Hornberger deposited into his personal bank accounts during the years '67 and '68 $156,000 received in payment for extras?

A Was I aware of the fact in '67 and '68?

Q Yes.

A I was not.

Q At the time you prepared these tax returns, which are in evidence, were you aware that Mr. Hornberger deposited into his personal bank accounts approximately $156,000 received in payment for extras?

A No.

Q Why not?

MR. BENDER: I object to that.

THE COURT: Sustained as to form.

Q Is there any reason why you did not?

THE COURT: No. The same question, same objection, same ruling.

Did you ever have a discussion with Mr. Hornberger about extras?

THE WITNESS: No, I don't think I ever did.

THE COURT: How many builders to you represent?

THE WITNESS: Half a dozen, maybe.

THE COURT: Is it usual that a purchaser orders extras, in your experience, when he purchases a new

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house?

THE WITNESS: Not necessarily.

THE COURT: Wait now, please. Custom-built house?

THE WITNESS: The custom-built house, yes, there would always be some extras.

In a house built from a model, for instance, i give you an example. Levitt house, they will not -- Levittown, tney would not deviate from the model. This is what you take.

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(Continued on next page.)

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Canale - direct

DIRECT EXAMINATION

BY MR. RYAN: (Cont.)

THE COURT: That's Mr. Levitt, isn't it?

Did you know that that was Mr. Hornberger's practice?

THE WITNESS: I didn't know what his practice was.

THE COURT: Oh. All right.

MR. RYAN: No further questions.

THE COURT: Go ahead.

CROSS-EXAMINATION

BY MR. BENDER:

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THE WITNESS: Can I add here?

THE COURT: No. You just answer questions, Mr. Canale.

MR. RYAN: I object.

Q Mr. Canale, at the time that you prepared these corporate tax returns, Exhibits 6 to 13 inclusive, did you assume that all of the extras that had been ordered were picked up and reflected in the cash receipts book, with respect to each job that was done?

A Yes. If there were any -- any income, I assume that it was picked up on the job sheet.

Q But as -- from your experience in representing

builders, you did assume, did you not, if you didn't know, that extras were ordered in connection with the building of these houses; isn't that right?

A I -- yes, I suppose so. I suppose you would assume that.

Q Well, did you know? I mean, did you know? Did you know during the period of time, in your representing Mr. Hornberger's corporations, in 1967 and in 1968, that there were extras that were ordered by buyers?

A No, I didn't know specifically that there were extras. Specifically I didn't know that.

Q Well, did you have -- did you assume that there were extras?

A I assumed that whatever we picked up in the job income was the proper income. In other words, no two jobs were exactly alike. in -- in regards to income.

So there could have been some small extras that made these differences.

Q Let me restate my question:

Did you know for a fact that with all of these houses that were built by these four corporations, or the fifth, which is not mentioned in the indictment, Elpa Builders, that there were extras ordered in connection with the building of the houses?

A Did I know for a fact?

3 Canale - cross

Q Yes, whether there were extras?

A No, I didn't.

Q Did you assume that there were extras, based upon your knowledge of the industry?

A I could assume that there were small extras. Whatever it might be.

Q Well, did you assume that there were extras?

A You know, I -- I don't know how to answer that because I don't really remember sitting down.

MR. RYAN: Objection.

THE COURT: No. If you can't answer it say you can't answer it.

Q Whatever was built by the corporation, whether it was extras or mail sale, did you operated on the assumption that all of that information was being given to you to be entered in the books?

A Yes.

Q Did you ever have any conversations by Vickie Coletti with respect to any extras?

A No, I don't think so.

Q Did you ever have any conversations with Mr. Hornberger with respect to any extras?

A Not at that time,no.

Q Did you ever discuss with Mr. Hornberger any

deposits which were made into the corporate accounts?

A NO.

Q ANd which you charged up or credited up as a stockholder advance?

A No.

I would take those up with Vickie usually, if there was any question or problem.

Q NOw, with respect to any deposit which you credited to the advance account, did you see any notations on the checkbook stub which reflected that the source of the deposit was EEH?

A Yes. I mean I think Trudy would be better able to answer that. Whenever she put -- she was instructed whenever there was something that indicated EEH or Elmer E. Hornberger, would go into advances on jobs -- stockholder advances, rather.

Q Yes.

And these were treated as loans, were they not?

A Yes.

Q From HOrnberger to the corporation?

A Yes.

Q Did you know whether in fact that they were loans?

5 Canale - cross

A I would probably have to say no to that. I would --

Q Would the corporation pay Mr. Hornberger any interest?

A No.

Q Any promisory notes issued between the corporation and Mr. Hornberger?

A Not to my knowledge, no.

Q Would it be a fair statement to say that you assumed they were loans?

A Yes, sure.

Q You were asked by Mr. Ryan about personal expenses of Mr. Hornberger that were paid for by, I think the illustration was Horn Enterprise? Do you recall that, in 1967? Exhibit No. 129?

A Yes.

Q And I think you indicated that there were debts to that stockholder's advance account of some $24,000 for the whole year; isn't that right?

A Yes.

Q And by that you mean that the stockholders' advance account where amounts were credited to Mr. HOrnberger was reduced at the end of the year by some $24,000?

Is that correct?

A Essentially, yes.

Q And some of those Mr. Ryan asked you to indicate was a country club and a pharmacy; do you remember that?

A Yes.

The pharmacy and the Connecticut General.

Q Yes.

How much salary did Mr. Hornberger draw for the year 1967?

A I didn't see the return.

MR. RYAN: Handing the witness Exhibit 4.

Q Is that the --

A 30,000. 30,600.

Q 30,600, was that gross salary?

A Yes.

Q Was that salary, to your knowledge, redeposited?

A Most of it was, yes.

Q To the corporation?

A Most of it was, yes.

Q And was 30,000 of Mr. Hornberger's salary added as a credit to his stockholder's advances?

A Yes.

Q Was that amount of salary that was credited to him sufficiently greater than the total amount of personal

7 Canale - cross

expenses that were paid for by the corporation?

A Yes, I think so. I think that's what our schedule showed. I don't have a copy of the schedule.

Q Mr. Canale, do you remember what Mr. Hornberger's salary was in 1968?

A No.

Q Would you look at the corporate return, the individual return?

MR. RYAN: Handing the witness Exhibit 5.

A 80,000.

Q Was that $80,000 paid to Mr. Hornberger or was it redeposited in the corporation?

A I think a great deal of it was redeposited to the corporation.

(continued next page.)

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BY MR. BENDER:

Q And was that -- whatever was redeposited to the corporation, was that credited to his stockholders' advances?

A Yes, sure.

Q So there was roughly some 80 in 1968 and some 30 in 1967?

A That's right.

Q Do you know how much Mr. -- Now, on those salaries, those were reported in his individual returns; were they not?

A Yes.

Q For 1967 and 1968?

A Yes.

Q And you calculated a tax on those salaries; did you not?

I don't think the stenographer got your answer. You just shook your head.

A Yes.

Q Now, do you know what the total amount of personal expenses that were paid for by the corporation for Mr. Hornberger in both 1967 and 1968 which were debited or which reduced the stockholders' advance account?

A No. I have to look at every corporation.

2 Canale-cross

Q You prepared some schedules, did you not, at my request?

A Yes. My secretary did. My -- Mrs. Paterno did.

Q And did she do that under your instructions?

A That's right.

Q And your supervision?

A Yes.

Q And did you review the schedules after she had prepared them?

A I looked at them, yes.

Q Were these schedules prepared from the books and records which are now in evidence?

A Yes.

Q Exhibits -- can we have those books, please? Thank you very much.

Those numbers are 128, 129 -- 128 being the Story Book Manor. 129, Horn Enterprises. 130 being Elpa Builders. 131 being Story Book Manor; and 132 being Dotal Building; and 133 being Story Book Homes.

That was a long question but I think I asked you --

A What was the question?

Q If you prepared these schedules from those books?

3 Canale-cross

A Yes.

Q Will you take a look -- may we mark these for identification?

THE COURT: Mark them individually.

MR. BENDER: Ten sheets, your Honor.

THE CLERK: Marked as defendant's exhibit H.

THE COURT: No. Mark them individually, H, I, J, K and so forth. So we know what the witness is referring to.

THE CLERK: A 3-page schedule marked defendant's exhibit H for identification.

(So marked.)

THE CLERK: 2-page schedule marked defendant's exhibit I for identification.

(So marked.)

THE CLERK: 3-page schedule marked defendant's exhibit J for identification.

(So marked.)

THE CLERK: 1-page schedule marked defendant's exhibit K for identification.

(So marked.)

THE CLERK: 1-page schedule marked defendant's exhibit L for identification.

(So marked.)

4 Canale-cross

MR. BENDER: May we have one more marked for identification, which would be M? Defendant's M for identification.

THE CLERK: So marked. It's a 1-page schedule.

(So marked defendant's exhibit M for identification.)

BY MR. BENDER:

Q Mr. Canale, I hand you these schedules which have been marked H to M inclusive for identification. Would you look at those schedules, please?

I mean, you've seen them before; have you not?

A Yes.

Q We've discussed them; have we not?

A Yes.

Q And you prepared them under my instructions; did you not?

A Yes. I didn't physically prepare them. My girl --

Q I know. Under your supervision?

A Right.

Q Now, tell us what those -- I mean firstly, where did you get the information which appears on those accountants' work sheets?

A From these books that we pointed out over here,

5 Canale-cross

from the books of account.

Q There isn't any entry that you have on those schedules which does not appear from those books and records?

A No. To my knowledge, no.

Q That are marked in evidence?

I'll offer these schedules into evidence.

MR. RYAN: Do you have copies?

THE COURT: Any objection?

MR. RYAN: I haven't seen them.

Do you have any copies?

MR.BENDER: I think so.

MR. RYAN: For us?

MR. BENDER: Yes, I do.

MR. RYAN: All right.

THE COURT: At this point objection sustained, unless the witness can say whether they truly and accurately reflect the books of account.

MR. BENDER: Very good. I will qualify.

THE COURT: Then it's introduced into evidence, they are not primary evidence. The evidence is the books of account. These are just guides for the jury, but I won't accept them in this form unless a proper foundation is laid or, alternatively, unless the government consents to their introduction.

6 Canale-cross

MR. BENDER: I'll attempt to --

THE COURT: If you want to call a recess to give Mr. --

MR. BENDER: Oh, no. I will attempt to lay a proper foundation.

THE COURT: All right.

Is Mrs. Paterno still here?

MR. RYAN: Yes.

THE COURT: Would you like to call Mrs. Paterno?

MR. BENDER: Only if I need to, your Honor. It may be that --

THE COURT: The witness said he just looked them over. You never compared them for accuracy, did you?

THE WITNESS: No. I can't state that they were categorically accurate. I'd have to check the records and go through the whole schedule.

THE COURT: It can be done one of two ways. Either Miss Paterno will lay the foundation or the government will concede.

MR. BENDER: Very well. Can we withdraw Mr. Canale and have Mrs. Paterno come in?

THE COURT: If you wish, Mr. Ryan, I will introduce them on your consent with the understanding

that if there are any inaccuracies in the schedule, then you may call my attention to it and I will strike it from the record.

MR. BENDER: Your Honor, I'm grateful for shortcutting it, but Miss Paterno is here and it will take a minute and I think --

THE COURT: Step down, please.

MR. BENDER: Miss Paterno, will you please take the stand?

G E R T R U D E P A T E R N O , having been previously duly sworn by the Clerk of the Court, resumed the witness stand and testified further as follows:

DIRECT EXAMINATION

BY MR. BENDER:

Q Miss Paterno, you -- has the witness been sworn, your Honor? Previously sworn?

THE COURT: Yes. You have been previously sworn. You understand you are still under oath?

THE WITNESS: Yes.

Q Miss Paterno, I show you the schedules which have been marked H to M inclusive for identification. Did you prepare those schedules?

A Yes.

Q What was the source of the information contained

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in those schedules?

A The ledger books.

Q Are those the ledgers which are before you?

A Yes.

Q And in evidence as 129 to 133?

Those are the numbers?

A Yes.

Q Are the entries which you have made on those schedules a true and accurate copy of the entries which have been made in those books 129 to 133?

A Yes. Everything is --

Q I'm sorry? I didn't hear. You dropped your voice.

A Everything is taken from -- well, like this one is cash receipts. The others are cash disbursements. They are taken from these books, yes.

Q And in particular, do the schedules pertain to any particular account in those books?

A Yes.

Q What account?

A Stockholder advance.

Q And that's the account about which you testified this morning?

A Yes.

Q Which would be an account kept in the cash receipts book and then in its total columns posted over into the general ledger?

A Yes.

MR. BENDER: I'll offer them in evidence.

MR. RYAN: May I have a short voir dire?

MR. BENDER: I be your pardon?

MR. RYAN: May I have a short voir dire?

THECOURT: Surely.

VOIR DIRE EXAMINATION

BY MR. RYAN:

Q Mrs. Paterno, do you recall that we were talking this morning about moneys that Mr. Hornberger had advanced and deposited into the corporate accounts which had the notations EEH on it?

A Yes.

Q I'm looking at defendant's M. This is the total of the amounts of money, I take it, that were advanced by Mr. Hornberger in one form or another during those years?

A Cash receipts.

THE COURT: No. Don't have a private conversation with Mr. Ryan. It is the jury that is interested in hearing what you have to say.

THE WITNESS: Yes, it is. Yes. Cash receipts

and journal entries. You see the headings there.

THE COURT: No. The jury cannot hear you.

Mr. Rudolph, please repeat it.

(Record read.)

Q Was there, from a review of your records in preparations for these schedules, advances into the corporation's accounts from moneys other than these EEH?

THE COURT: I don't think this is a proper voir dire.

MR. BENDER: I object.

THE COURT: Objection sustained.

The only question on the voir dire is whether these schedules accurately reflect the conditions of the books. Nothing else.

Q And they do?

A Yes.

MR. RYAN: No objection.

THE COURT: All right; they may be marked, with the understanding that if you find that there is a discrepancy in what the books say and what these schedules say, what counts is what the books say. These schedules are just for easy reference.

THE CLERK: Defendant's exhibits H through M inclusive previously marked for identification now

marked in evidence.

(So marked.)

MR. BENDER: May we now ask to have Mr. Canale back on the stand, your Honor.

THE COURT: Yes.

MR. BENDER: Thank you very much, Mrs. Paterno.

THE COURT: For your questioning on these schedules, please assume the accuracy of these schedules and that they accurately reflect what's on the books of account of the corporations.

(Continued o n next page.)

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Canale - cross

THOMAS J. CANALE, called as a witness, having previously been duly sworn, resumed the stand and testified further as follows:

CROSS EXAMINATION

BY MR. BENDER (Continued):

MR. BENDER: While we are waiting (Mr. Bender hands document to witness)

BY MR. BENDER:

Q First, tell us what the total of the Stockholder Advances were which were credited to the Stockholder Advances for Mr. Hornberger for the years 1967 and 1968?

A $248,263.31.

Q And that appears in Schedule M in evidence?

A YEs.

Q And can you tell us, if you will, of that amount what was the total in 1967 and what was the total in 1968?

A I would have to add them up.

Q Well, why don't you give us --

A About $50,000 some odd in 1967. The balance in 1968.

Q Roughly, $195 or $198 in 1968?

A Yes.

Q How much of that on your schedules represented salary redeposited by Mr. Hornberger to the corporation, and

if you have that listed on the schedule, please give us the number or the letter of the schedule in which the salary is reflected as such and then credited to the Stockholders Advances.

A 1967 or 1968, or what?

Q 1967, if you count the total, and then in 1968.

A Again, I would have to, you know, make a summary of it.

Q Well, there is a tape that appears on -

THE COURT: Well, Mr. Bender, I will not allow the witness to do nothing more than read from the schedules in evidence. If you wish you may read it to the jury.

MR. BENDER: Okay.

BY MR. BENDER:

Q Will you look at the tape and let's be guided. Is there a breakdown of the tape on the salary?

A Yes, there appears to be, yes, sir.

Q What is it?

A $78,144.40. That was both 1967 and 1968. In 1967 $23,319.20 and $55,825.20 in 1968.

THE COURT: Are you saying that the salary he paid into these corporations, into his advances, was over $55,000.00 in 1968?

THE WITNESS: Yes.

THE COURT: OUt of his salary in 1968?

THE WITNESS: Yes.

THE COURT: Didn't you say his salary was $40,000?

THE WITNESS: $80,000.

THE COURT: Oh, $80,000.00 1968.

Q Is the salary reflected on the 1968 individual income tax return of Mr. Hornberger, Exhibit 5?

A $80,000.00.

Q It is reflected right on the return, is it not?

A Yes.

Q Now, can you tell us from those schedules, and tell us where you have a total of the amount that was withdrawn by Mr. Hornberger for personal expenses paid for by the corporation.

A For the two years?

Q Yes.

A The total figure is $56,910.72.

Q Can you tell us what it was, if you can, for 1967 and 1968?

MR. RYAN: I am sorry. I think that last figure was representing one year.

MR. BENDER: No, it was not one year. It was both years.

Canale - cross

Q Am I right, Mr. Canale?

A That was both years.

Q The $56,000 odd was for both years?

A '67 looks like about $33,000 and $23,000 for the other -- $28,000 --

MR. RYAN: I object. Will you specify how much each year.

THE COURT: No, this is one examination at a time. You will have an opportunity on redirect to ask those questions. If you don't like the question and if you think it is objectionable, make the objection and I will rule on it.

MR. RYAN: I object.

THE COURT: Objection overruled.

Q Are you working on a question, Mr. Canale?

A I am -- I think it was $33,000 in 1967 and about $23,000, 1968.

THE COURT: We will take a short recess. We will take about a 20-minute recess.

(The jury thereupon retired at 3:15 o'clock.)

(The following occurred in the absence of the jury.)

MR. BENDER: Shall we take our recess now?

THE COURT: Yes. But I want to talk to the

lawyers. Mr. Bender, I have no objection if you read any part of the exhibit or if you wish to pass it around. But I will not take the time of the Court to ask Mr. Canale to just ready rote. He doesn't know what is on the schedules at all. He just knows that Mrs. Paterno got them up from the books. You are asking questions. I know you are asking questions to make a certain point -- well I'm not going to say anything more about the point because I will leave that to the lawyers -- but the important thing for me is I will not take the time of the Court to just have a witness read from a document he knows nothing about just for the purpose of getting it across to the jury.

MR. BENDER: He does know about it, your Honor. I have gone over it with him.

THE COURT: Mr. Bender, I heard him say that I just assume that Mrs. Paterno did her work; that she got the schedules up from the books.

MR. BENDER: I heard that.

THE COURT: I asked him to assume that they are correct. But just to have him read it, if you like his voice better than your own, I will read it to the jury.

MR. BENDER: All right, I will be guided by what you say.

THE COURT: But let's not take the time of the Court.

MR. BENDER: I will be guided by what you said.

THE COURT: All right. We will take about ten minutes.

(Short recess.)

Canale-cross

HS:ss

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BY MR. BENDER:

Q Mr. Canale, I show you government's exhibits 6 to 13 inclusive, which have been identified as the corporate tax returns for 1967 and '68.

You testified you prepared them, did you not?

A Yes.

Q And did Mr. Hornberger sign these returns?

A Apparently so -- yes, apparently.

Q Do you recognize his signature?

A I can't be sure it is his signature. I would assume it is.

Q Don't you know -- weren't you present? Didn't you hand him the returns?

A Probably.

Q Were you there?

A I probably did.

Q Did you go over the items with him?

A No.

Q What was your procedure?

A I said "Here's the returns, sign them," and we'd mail them giving him a copy of them.

Q Did you mail them?

A He would.

Q If there wasany check that had to be paid, did

you instruct him how much to pay?

A Yes.

Q Was that what it was, simply the returns were given to him?

A Yes.

Q You didn't go over any of the items on the returns?

A No.

Q Did he rely upon you as far as the accuracy of the returns were concerned?

A Yes.

Q How about his individual returns, exhibits 4 and 5, did you follow the same procedure?

A Yes.

Q Did you go over the items on that return?

A I probably did not.

Q You did the same thing, you handed it to him and had him sign it?

A Yes.

Q Now, you also prepared and handled other returns for the corporations, did you not -- 941 payroll returns?

A Yes.

Q 1099 -- I mean did you have forms which had to

be filed with respect to employment and payments or commissions over a certain amount?

A Yes.

Q Now, did Mr. Hornberger ever instruct you how to handle the books and records of these corporations for the years '67 and '68?

A No.

Q Did he ever instruct you how to make any entries?

A No.

Q Did he ever tell you not to make entries?

A No.

Q Now, you were asked whether you ever told Mr. Hornberger -- before the revenue agents came in on the audit which led to this case -- whether you ever had a conversation with Mr. Hornberger about telling him that he had to report the income or deposits -- do you recall Mr. Ryan asking you about that?

A I think he meant before '67 or '68 --

Q Did you ever tell Mr. Hornberger how you were preparing the corporate income tax returns -- that is the way in which you obtained the information or the source of the moneys?

A Prior to '67 and '68?

Q In 1967 and 1968 or prior thereto?

A No, I probably never did.

Q Mr. Hornberger did not know specifically that you were writing up the cash receipts book of the different corporations solely from bank deposits into the corporate accounts; isn't that correct?

A He probably -- yes, he knew I got the bank statements.

Q He didn't know how you were preparing the income?

A I don't think heknew.

Q Now, did you have a conversation with Mr. Hornberger after the agents came in?

A We had a lot of conversations.

Q Let's take after 1969, do you recall when the first revenue agent came in on this investigation?

A Latter part of '69, I think.

Q That was Revenue Agent Jeremiah?

A That's right.

Q Subsequently other revenue agents came in, did they not?

A Mr. Wechter.

Q Mr. Wechter?

A Yes.

Q Special Agent George Mazella who is sitting here?

A Yes.

Q How many times do you recall you were questioned byeither Revenue Agent Jeremiah, Mazella -- Revenue Agent Wechter, Revenue Agent Valardi?

A 20 times maybe, including Jeremiah. We had quite a few sessions.

Q During one of those conversations, do you recall meeting with Special Agent Mazella in September of 1972?

A I am not sure of the date -- you know -- I met with Mazella on several occasions.

Q Do you recall a conversation which had to do with where the deposits came from --- these unexplained deposits to the corporate accounts for '67 and '68?

A I don't recall -- I don't know how to answer that.

Q Let me refresh your recollection -

THE COURT: The jury may be excused.

(Jury oleaves Courtroom.)

THE COURT: Would you take a position outside the doors of the Courtroom, please.

(Witness leaves Courtroom.)

THE COURT: I will take an offer of proof, Mr. Bender.

MR. BENDER: I have a memorandum given to me by the government of a conversation or an interview between Mr. Canale, Mr. Hornbergerand the special agent.

THE COURT: Yes.

MR. BENDER: At which time questions were asked about some of these deposits which apparently were the extras that were returned.

THE COURT: Yes.

MR. BENDER: I am saying that to you -- this is my impression.

THE COURT: I respect your theory.

MR. BENDER: It is not a theory.

All I want -- it has to do with the opening statement that Mr. Ryan made that Mr. Hornberger deliberately lied and told Mr. Mazella on this occasion that the unexplained deposits of $150,000 came from his mother. He was present. The memorandum shows that he was present at thattime.

THE COURT: I thought that you were trying to explain all these deposits by Mr. Canale --

MR. BENDER: Absolutely not, your Honor.

THE COURT: I might say to explain my reaction

when Mr. Canale pointed to Mr. Levin as thebuilder who never had an extra, he probably pointed to the one builder in many that would never permit an extra and he knows it as well as I.

MR. BENDER: Thatwould never permit an extra?

THE COURT: Not even a change of color in the linoleum. That was an exception and he knew it too.

MR. BENDER: This is a field which I am so ignorant of.

THE COURT: Iknow a little about it. I will allow it on the theory advanced by Mr. Bender.

You may continue.

(Jury present.)

MR. BENDER: May we mark this for identification, please?

THE CLERK: 3-page document marked defendant's exhibit N for identification.

(So marked.)

BY MR. BENDER:

Q In particular I am referring to a conversation that you had at which time Mr. Hornberger was present with Special Agent George Mazella and Revenue Agent James Wechter at your office at 154 West Main Street, Bayshore, on or about September 14th, 1972.

Do you recall that -- being interviewed on

A 333a

that day?

A Yes, I remember we went over some of these unexplained deposits.

Q And was there any question asked of you or Mr. Hornberger on that occasion what these unexplained deposits -- what the sources were?

A Yes.

Q What did you say or what did Mr. Hornberger say?

A There was an explanation that some of these deposits came from his mother -- loans from his mother to him .

Q Was the conversation with respect to the unexplained deposits or the stockholders' advances?

A - I think the unexplained deposits which were in the stockholders' advance account.

Q At that time was there -- were you advised by any of the agents that these -- that the stockholder advance: -- withdrawn.

Did Mr. Hornberger -- was any specific amount mentioned as to the unexplained deposits?

A No, I don't think so.

Q Did Mr. Hornberger ever say that he got $150,000 from his mother?

A I don't think so -- I don't recall that, no.

Q Your best recollectionis that he said that he thinks some of the moneys may have come from moneys that he got from his mother?

A Yes.

Q Was there any conversation about the stockholders' advances?

A They were working -- this was the stockholders' advance account that we were talking about.

Q Were you and Mr. Hornberger asked "What's the source of the moneys that were credited tothe stockholders' advance account?"

A Yes, we were probably asked that.

THE COURT: When you say "We were probably asked," are you giving us your best recollection?

THE WITNESS: He must have asked us.

THE COURT: Mr.Canale, you may testify on the basis of your best recollection no matter how weak it is. You may not just guess at what happened.

THE WITNESS: I am not guessing.

He had individual items -- individual things that he said, you know, what aboutthis one, can you explain this one?

The explanation at that time by Mr. Hornberger

was that some of these came from his mother -- he couldn't pin them down.-- they had specific amounts that were deposited on certain dates and they were questioning these items -- these particular items.

Q Now specifically, with respect to the stockholders' advances -- excluding the salaries credited -- Mr. Hornberger's salaries credited -- was any explanation given by you or Mr. Hornberger to the agents, either on that day or at a later meeting,as to what the sources were?

A I could only say they were gifts or loans from his mother.

Q You mean some of them?

A Some of them, yes.

Q Did you ever tell Special Agent Mazella and Mr. Hornberger at one of these meetings that you did not know why these receipts were posted in the stockholders' advance account?

A I don't think I said that.

MR. BENDER: May we have this marked for identification?

THE CLERK: 3-page document, so marked defendant's exhibit O for identification.

(So marked.)

MR. RYAN: May I have the date?

11 Canale-cross

MR. BENDER: October 10.

Q Now, this is a memorandum of the interview which was given to me by the government.

I show you exhibit O for identification. I ask you to turn to page 2, second paragraph, 6th, 7th lines down from the top.

Just look at it and see ifthat refreshes your recollection in any way whether you said that to Special Agent Mazella and keep in mind this is a memorandum that was prepared -- not by you -- I am just handing it to you to see whether it refreshes your recollection.

A Yes, I don't remember saying that -- I don't remember saying that. I can't answer that, you know, categorically.

Q All right.

THE COURT: Is the jury going to be advised to what he doesn't remember saying?

MR. BENDER: I will be glad to. It is not in evidence. I do not know how to do it.

THE COURT: I will allow you to ask. It may be a little out of order, because the defendants are anticipating certain testimony. Instead ofcalling him back, I will permit the question to be put.

MR. BENDER: This is a report by Special Agent

12 Canale-cross

Mazella and another Special Agent Michael Daly of an interview with Mr. Hornbergerand Mr. Canale on, October 10th, 1972. On page 2 the reference that I referred to:

"Both Hornbergerand Canale says that they did not know why those receipts were posted under stock-holders advances."

Q You say you have no recollection?

A I don't remember saying it.

Q Either you or Mr. Hornberger saying that?

A I don't remember saying that.

(Continued on next page.)

GR

GR:ss
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Canale-cross

BY MR. BENDER:

Q Now, Mr. Canale, the books and records that have been marked in evidence here, the corporations, which you kept, by you -- I mean, Miss Paterno, under your supervision -- did those books reflect every -- I mean, to your knowledge, every job that was contracted by the corporations in 1967 and 1968, for the building of a home?

A Yes, yes.

Q What else, with respect -- withdraw that.

Did these jobs have a separate ledger sheet?

A Yes. It had -- or two on a sheet, a job, costs and had a ledger sheet for income on jobs.

Q What was your procedure in preparing the income on the tax return? Did you include jobs in process as well as completed jobs?

A No. We reported income on a completed job basis. Only the jobs that were closed in a particular year were -- would be included in the sales for that year. Anything that was in process or didn't close until the following year would be carried over tothe following year.

Q When the jobs were closed, what did you do? What entries would you make in the corporate records?

A Make an entry taking out the particular income made on a particular job. Job number 45, let's say, and I

would charge -- I would credit that -- pull that out of the advances on jobs account and put it into sales account.

Q Did you have available -- in other words, you listed under that job number -- did you list under the job number advances paid in on the contract to build the house?

A Yes. Any -- any money that came in on that job indicated -- applied to that job would be in that account under that job number.

Q How about expenses in connection with the building of the house?

A That was a separate account. Any expense charged to that account would be charged to jobs in process account, broken down by jobs.

Q You never reported on a tax return the income with respect to a job, except when it was closed?

A That's right.

Q When the title had been passed?

A That's right.

Q To the buyer; is that right?

A Yes.

Q So prior to that time, you had -- if a contract which -- to build a house ran from one year to the other, 1967 to 1968, and was not closed, you did not deduct either the expenses on the house or pick up the advances

until it was closed?

A That's right.

Q And do you personally know, when you put down the total amount of income received for the house that was sold and title passed, whether that included extras ordered and paid for?

A Well, I included -- I assumed that included everything.

Q Did you, aside from an assumption, go to the job files or the closing statements or the contracts to verify?

A No.

Q What the amounts were?

A No.

Q You never did that during 1967 and 1968?

A No, I never did.

Q You did that for 1969; did you not?

A Yes.

Q Why did you do it for 1969?

A Because of these unexplained deposits that we had discovered in 1969, latter part of '69. We wanted to make sure we picked up allthe income and not take any chances on '69 of -- of possibly not picking up all the income.

Q You mean, it was made quite clear during the investigation, in your conversations with Special Agent and the Revenue Agent?

A Not Special Agent. The Revenue Agent.

Q That there were extras that had been paid and which somehow or other you had not included in the books and records with respect to the purchase price of the various houses?

A Yes.

Q Is that right?

A That's right.

Q Did you have a conversation with Mr. Hornberger about that, when the agents points this out to you?

A Well, I had conversations. I said "Look, I don't want to get caught like this. Make sure we get all the income." So I asked him to make a list, make a list of the extras.

Q That was for '69?

A For '69.

Q Did you ask him to give you the job files?

A I don't think I looked at the job files in '69. I had the income and I -- and the extras I -- he gave me a list of the extras.

Q Did you look at the closing statements?

5 Canale-cross

A I don't recall whether I did or not. I might have looked at the closing statements.

Q Would you tell the Court and jury, when I mentioned closing statements, just what that is or what they are?

A A closing statement is a form prepared by the attorney in which he indicates the selling price and any adjustments that are made on the selling price on one side and the credits on the other side, amounts paid on the contract and the balance due and owing at thattime, at the closing.

Q Now, aside from what you did in 19 -- for the 1969 year, did you actually have a conversation with Mr. Hornberger wherein you reportedto him what theagents were saying, that extras were not picked up as income?

A Well, the agent --

THE COURT: Is there any objection tothis line ofquestioning, Mr. Ryan?

MR. RYAN: Not at this time.

THE COURT: All right. Youmay continue.

A (Continuing.) I don't know whether we discussed the specific -- the term "extras." There was unexplained deposits. This was what Mr. Jeremiah was concerned with. He said there is unexplained deposits here on

his audit.

Now, we probably -- I don't know whether -- at that time we realized these must be the extras, extras that were not put into the corporation, but we were concerned with unexplained deposits.

Q You were concerned also with preparing accurate returns; were you not?

A Absolutely. Absolutely.

Q And you had been familiar with the building business; had younot?

A Yes.

Q And it was your function to prepare accurate corporate returns; was it not?

A That's right.

Q Areyou telling this Court and jury that you relied solely upon some bookkeeper or girl in the office who gave you a notice on the backof a checkbook stub, to determinewhether or not the income should be picked up?

A Yes.

MR. BENDER: I have nofurther questions.

REDIRECT EXAMINATION

BY MR. RYAN:

Q You mentioned on cross-examinationthat Mr. Hornberger knew that youwere working from bank records

in preparation for income?

A Well, he must have knownthat I picked up -- you know, I assumed he knew that I picked up bank statements and check stubs.

MR. BENDER: I move to strike that. He assumes he knew. That's just a guess on his part.

THE COURT: No. I will allow it to stand.

I think he said thatin response to your question, Mr. Bender,and I think he's allowed to explain that answer on redirect.

Q What is the basis foryour assumption,sir?

MR. BENDER: What period oftime are we talking about? I object.

THE COURT: Do you have an objection?

Objection overruled.

Incidentally,not every question is confined to 1967-'68. You asked himquestions relating to post-indictment period,too.

MR. BENDER: I did, your Honor. That's why --

THE COURT: I allowed it.

MR. BENDER: That's why I want to know what period we are talking about.

THE COURT: I will allow the question inthe form thatit is presented.

8 Canale-redirect

BY MR. RYAN:

Q What was the basis for your assumption that Mr. Hornberger knew?

A That I was taking the bank statements?

Q You were relying -- you were working from bank statements to construct income?

A Well, he knew I -- he knew that I took bank statements. He must haveknown that I took bank statements and check stubs.

Q Did you ever have any conversation with him about that prior to '67 or '68?

A A specific conversation I can't recall, and I might have had a conversation somewhere from 1959 or -- on, but I can't recall any specific conversation. He was -- he was -- can I add this, your Honor?

THE COURT: No. Just answer questions, Mr. Canale.

Q You were about to explain to us something about Mr. Hornberger. What was it?

A He was a very busyman. He was very difficult to talk to. You didn't get a chance totalk tohim.He was on the phone. He had three,four conversations. This guy had that problem, somebody else had anotherproblem. Very difficult to talk to.

Q But my question is directed to other conversations you had with Mr. Hornberger concerning the procedures you followed to construct income.

A Well, I don't think we ever really discussed. I don't think he was aware of how I -- I got income.

Q Well, whenyou say that you assumed that he knew that you were constructing income from bank records, what is the basis for your assumption?

A No. I said I assumed that he knew I was taking the bank statements and the check stub s and the cancelled checks. How -- I didn't say he assumed that I was constructing income from that.

I don't know whathe assumed as regards to that.

What I am saying is I don't think he really knew. This was not his concern. I mean, he was busy building houses.

Q Did he know what records you would take from his office to perform your function as the accountant?

A He knew I would take the check stubs and the bank statementsand the cancelled checks.

Q Any other records?

A No. I nevertook anythingelse outof his office. Maybe his payroll book.

10 Canale-redirect

THE COURT: Were you ever at his office?

THE WITNESS: Sure.

THECOURT: Did you physically take the checkbook, bank records?

THE WITNESS: Thegirls,Vicky or somebody would give me the --

THE COURT: Give it to you.

THE WITNESS: Would give -- the checkbooks are looseleaf. Shewould pull out -- let's say we're doing a month, January, February, or two months at a time. She would pull those out. She would give me the bank statements and that was it.

THE COURT: Was that ever done in Mr. Hornberger's presence?

THE WITNESS: Might have been.

BY MR. RYAN:

Q What do you mean, "It might have been?" Was there ever any occasion from 1959 --

A There must have -- let me say --

Q -- to 1968?

A Sure. There must have been times when he saw what I was taking.

THE COURT: When you say "must have been," you say it's your best recollection there were times

11 Canale-redirect

or are you just guessing?

THE WITNESS: I would have to say that.

Q No doubt about that?

A No,no doubt about it.

Q Sometime in 1969, according to the cross-examination, you had a conversation or you were present when Mr. Hornberger,yourself and Mr. Mazella had a conversation about unexplained deposits; correct?

A Yes.

Q And you were asked by Mr. Mazella or whoever else was with him from the --

A I think that was later than '69. You said '69? That was '72 or something. Wasn't it?

Q Well, on cross-examination do you recall Mr. Bender asking you about a September, '72 meeting?

A Yes. You mentioned '69, you just said in your question.

Q All right. I'm sorry. Withdraw that.

Okay. I'm referring to the conversation you were asked on cross-examination about where these deposits came from, what the source of the moneys were. That's what I am referring to.

A About the -- about his mother's giving him?

Q Yes. All right?

12 Canale-redirect

Do you want to read that document to yourself before I ask the next question?

MR. BENDER: Is that --

THE COURT: What exhibit number is that?

MR. BENDER: N for identification.

MR. RYAN: The same document --

THE COURT: All right.

MR. BENDER: Which I gave to him.

THE COURT : All right. May we have the question, Mr. Ryan?

Q Are you finished reading it, Mr. Canale?

A Just one minute, yes. Go ahead.

Q First of all, there was discussion about unexplained deposits; correct?

A That's right.

Q What was said about unexplained deposits? What unexplained deposits were you talking about?

A We were talking about unexplained deposits which were posted to the advances in -- stockholder advance account.

(Continued on next page.)

DDS

Canale-Redirect/Ryan

Q Okay. And how much were you talking about, if you recall? How much money are we talking about?

A It says $150,000.00 here.

THE COURT: No. The question isn't what is stated in that exhibit before you, but what you recall the discussion to be. It is your testimony.

What do you recall the conversation to be?

THE WITNESS: Well, there are many items or several items of unexplained deposits. What they amounted to I don't recall.

THE COURT: Well, when you talk about unexplained deposits are you talking about unexplained deposits into his personal account?

THE WITNESS: No, into the corporate account.

THE COURT: No discussion as to the deposits into his personal account.

THE WITNESS: No.

Q So the discussion was about the deposits into the corporate account, is that correct?

A Yes.

Q Posted as a stockholder advances? Is that correct?

A Yes.

Q Do you know what are the basis for the posting was?

A The information supplied on the check stubs.

Q And do you remember what that information said?

THE COURT: No, we have gone over that many, many times, Mr. Ryan. Let's not do it all over again.

MR. RYAN: I'm trying to fix the subject matter.

THE COURT: All right, one more repetitious question. Then go on to a new area, please.

A The deposits which are marked EEH or something like that.

Q Now, were the agents asking you and Mr. Hornberger about these deposits?

A Yes.

Q Several of them?

A Yes. Many of them. I think that probably Jeremiah had a schedule. They would pick up the item and ask about it.

Q All right, tell us everything that was said that you can recall.

MR. HORNBERGER: As to the source of those deposits into the corporate accounts.

A Well, as I recall, I said to -- you know we would come across a deposit, and if I could explain it, maybe sometimes it was a corporate transfer or something, and we explained it. If we couldn't we would say that is unexplainab Then of course the general explanation given at that time was

that some of this money had come from his mother.

Q Did that apply to one or two deposits, or ten?

A I don't know.

Q How many ?

A We couldn't pin it down. I don't know.

Q Was there ever any explaination given by Mr. Hornberger at that meeting with respect to extras as it being the source of money deposited into the corporations?

A I don't recall him saying that.

Q Not one word?

A I don't recall it. I don't recall it. Honestly, I don't know.

Q The schedules that you have prepared for Mr. Bender --

A Yes.

Q -- You gave us on cross-examination the total amount of stockholder advances? Correct?

A That is right.

Q Were you able to identify from your records the manner in which these moneys were advanced to the corporations?

MR. BENDER: I object to the form of the question. What records?

THE COURT: Objection sustained.

Q Were the stockholder advances to the corporation in

the same form on each occasion.

MR. BENDER: I object to that.

THE COURT: Do you understand the question?

THE WITNESS: I don't really understand what --

THE COURT: Well, that's the answer. Please reframe it.

Q These unexplained deposits that we have just been talking about, do they constitute all of the stockholder advances that you have set forth in your schedule, defendant's Exhibit M, or a part?

A No, because there are explained items in that schedule.

Q In other words, there are advances --

A Salaries for instance that are --

Q Please. There are advances that were explainable? Is that correct?

A Yes.

Q Explainable in what form?

A Salaries.

Q All right. Now, will you tell us how it came about that Mr. Hornberger made advances through salary.

A Well, he paid himself a salary and would deposit some of it back into the corporation as a loan.

Q Now, when you say he paid himself a salary --

A The corporation paid him a salary, when I say that. I shouldn't say -- the corporation paid him a salary.

Q Who signed the check?

A Well, he probably did because he signed all the checks.

Q And what would happen with the check?

A He cashed it and made a deposit on part of it or all of it.

THE COURT: Well, do you know what he did?

THE WITNESS: He cashed the check or redeposited it back into the account.

THE COURT: Did he just endorse it and redeposit it into the corporate account.

THE WITNESS: He might have done that. I'm not sure. You know, he might have cashed it --

Q Is there some way that you could determine whether he cashed the check and deposited the cash, or just endorsed the check and deposited it into the corporate account?

A I believe if you look at the check you can tell. I don't know. All it would have is his signature in the back. I don't know whether it would prove what happened.

Q When would this be done during a given year?

THE COURT: Are you asking this witness what he

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knows of his own personal knowledge or what he gets from the books?

Q I am asking you from your own personal knowledge based on the book entries.

THE COURT: You know what happens from your own personal knowledge -- wait a minute -- do you know from your own personal knowledge the nature of the transaction Did you see it done in any way at any time?

THE WITNESS: No.

THE COURT: All right, can you tell, can you express an opinion from anything that you have seen in the books, as to the nature or manner of the transaction that involved redepositing his salary or part of his salary into the corporate account.

THE WITNESS: Well, we would see a deposit on the bank statement for an amount that was apparently his salary.

THE COURT: Was it equal to his salary.

THE WITNESS: It might have been his net salary. If the check was equal to his net salary, he might have endorsed it over and it went back into the corporation.

MR. RYAN: All right, now --

THE WITNESS: Or stayed in the bank account in effect.

Q -- In other words, the funds would never go out of the bank?

A Possibly. I don't know.

Q Of course, the corporation would be entitled to a deduction, would it not?

A Yes, that is right.

Q For employees' salaries?

A Yes.

Q Did you ever have a discussion with Mr. Hornberger about the job files that Mr. Bender asked you about?

A Since what time? What time?

Q I'm talking about 1967 or 1968.

A No, I never looked at the job files. We never discussed them.

Q Was there any reason why you didn't?

A It wasn't necessary. We had all the information on the check stubs.

MR. RYAN: Thank you. No further questions.

MR. BENDER: No questions.

THE COURT: All right, you may step down.

(Witness excused)

THE COURT: We will take a short recess and then I will call you back.

(The jury then thereupon retired from the Courtroom at 4:35 O'clock P.M.)

(The following occurred in the absence of the jur

THE COURT: I can take about 10 or 15 minutes further on this. If you have a witness that comes from a long distance whose testimony you would like to offer? Do you have some witness like that?

MR. RYAN: No, we do not need an accommodation at this point in as much that we appreciate it.

MR. BENDER: We have the stipulation finished which can be read into the record. We'll take a minute.

THE COURT: All right, bring in the jury.

MR. RYAN: How about the stockholder advance?

MR. BENDER: Well, let's do one thing at a time because of the stockholder advance thing, you may look at the schedules and you may have your whole answer there.

(The jury thereupon returned to the courtroom.)

MR. BENDER: Your Honor, would you like to look at a copy of it (handing it)?

THE COURT: Have you agreed to it?

MR. BENDER: We have.

THE COURT: The parties have entered into a written stipulation as follows:

It is hereby stipulated and agreed that Government's Exhibit 14 through 107 received in

evidence represent 92 separate transactions in which buyers paid for extras. That the checks were made payable to the defendant pursuant to his instructions. That the aggregate sum of the extras paid was approximately $42,000.00 for 1967 and $113,000.00 for 1968. Dated: Brooklyn, New York, June 25, 1974, and signed by Mr. Ryan for the Government and Mr. Bender.

We will suspend at this time. The case will continue promptly at 10:00 o'clock provided that you are all here on time. I ask you to make a special effort to get here.

Again, in the meantime, don't talk about this case with anyone. And when you reassemble tomorrow, do not discuss it among yourselves. Try to get into the court about 20 minutes to ten or a quarter to ten, register downstairs, and then come to the juryroom adjoining the courtroom. The jury is excused.

(The jury thereupon retired from the courtroom.)

THE COURT: All right, gentlemen, I would appreciate your picking up all your briefcases as soon as possible. Have a grand jury that has an indictment. As I understand it, it is a secret proceeding. No one may be present, except authorized personnel.

If you would like to leave everything, you can leave it and then come back. Would you like to do that? Just leave the courtroom for a few moments and then come back.

(Thereupon at 4:45 o'clock P.M. an adjournment was taken to June 26th, 1974 at 10:00 o'clock A.M.)

THE COURT: Are you ready, Mr. Ryan?

MR. RYAN: They are bringing down the documents. I would like to offer the request to charge.

THE CLERK: Request to charge, Government's, marked Court's Exhibit 1 for Identification.

MR. RYAN: I have another document that I would like to mark as 3500 material, the next Government exhibit. It is an affidavit of Peter Gerimia.

THE CLERK: Document consisting of two pages, marked Government's Exhibit 138 for Identification.

MR. RYAN: I would like to apprise the Count and counsel how I would like to proceed this morning.

MR. BENDER: That's very nice.

MR. RYAN: Before I call the Special Agent as to allegations of extras, which were based on examinations conducted by revenue agents, I will call the revenue agents to identify the schedules that they prepared.

One agent is going to testify as to computations. I would like to recall him later.

THE COURT: All right. Seat the jury.

(Jury present.)

THE COURT: Good morning, ladies and gentlemen. I think we are ready to proceed on time today.

JUROR NO. 1: The last statement you read before

you dismissed us last night, could you read it for us again, please.

THE COURT: I read the stipulation on page 356.

The parties have entered into a written stipulation as follows -- incidentally, it's in evidence so it can be circulated if you wish.

MR. RYAN: I would like to mark it.

THE COURT: Mark it.

THE CLERK: So marked as Government's Exhibit 139 in Evidence.

THE COURT: The parties entered into a written stipulation as follows:

Hereby stipulated and agreed that Government's Exhibits 14 through 107, received in Evidence, represent 92 separate transactions in which buyers paid for extras, that the checks were made payable to the defendant pursuant to his instructions, that the aggregate sum of the extras paid was approximately $42,000 for 1967 and $113,000 for 1968, dated Brooklyn, New York, June 25, 1974, and signed by Mr. Ryan for the Government and Mr. Bender for the defendant.

JUROR NO. 1: Thank you.

MR. BENDER: Could you explain to the jury -- they may be unaware -- what the stipulation means?

THE COURT: A stipulation is the same as

evidence. The parties agree that that is the fact. It is part of the record, as if the witness had testified to certain facts and you found it so. That eliminates a lot of testimony from a lot of witnesses. If this stipulation were not entered into, it might very well be that we'd require 92 witnesses to appear before you and say what happened during each transaction. That was all eliminated by agreeing that is what happened.

MR. RYAN: The exhibits are in evidence, 14 through 107. The jury hasn't seen them all. They are all here.

THE COURT: They will be made available because they have been marked into evidence.

If any of the jurors ever want to see any of the transactions, of course, it is available to them.

MR. RYAN: I would like to pass around the stipulations at this time.

(Document shown to jury.)

(Continued on next page.)

MR. RYAN: Mr. Gerimia.

P E T E R E. G E R I M I A, called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: State your full name, please.

THE WITNESS: Peter E. Gerimia.

DIRECT EXAMINATION

BY MR. RYAN:

Q Mr. Gerimia, would you tell us your occupation?

A I am a retired revenue agent and presently I'm a self-employed accountant.

Q When did you retire?

A I retired on October 15, 1971.

Q Prior to your retirement, were you assigned to do any work in your capacity as a revenue agent with Revenue to Elmer E. Hornberger?

A Yes.

Q Just tell us generally, as a revenue agent, what was your assignment, briefly?

A My assignment was the examination of the personal return of Mr. and Mrs. Hornberger and the corporations involved.

Q In the course of your assignment, did you have

2 Gerimia - direct

occasion to look at any of the corporate books and records?

A Yes.

Q What was the objective of your reviewing the books and records?

MR. BENDER: I would object to that.

THE COURT: Sustained.

Q When did you review the books and records?

A It was my recollection that I initiated the examination in 1969.

Q Where did you conduct your examination?

A The first visit was -- I believe -- Mr. Canale's office -- he is the accountant for the corporations.

Q What records did you review?

A I reviewed all of the records of the corporations, mainly or specifically the cash books and disbursements, the general ledger and the journal, as well as contracts of sale with respect to one corporation.

Q Did you prepare any worksheets as a result of your review of the books and records?

A Yes.

Q I show you what has been marked 115 for Identification. There are five folders in here.

Can you point out to us any worksheet that you prepared as a result of your review?

THE COURT: Would you please describe

the folder that you took out of the exhibit and then identify the particular worksheet that you are testifying to?

THE WITNESS: Yes, your Honor.

I examined the return of Story Book Homes, Inc., which is known as 1120S corporation, and the schedule that I prepared was a contracts of sale, closings in 1968.

I just want to state that my examination encompassed two years, '67 and '68. This schedule that I have before me is the '68 schedule.

THE COURT: You are putting a clip into it?

THE WITNESS: Yes.

THE COURT: I would rather that the Clerk letters it. What exhibit was that?

THE CLERK: 115.

THE COURT: 115A, being a document into evidence --

MR. RYAN: It's for identification.

BY MR. RYAN:

Q Did you prepare any other?

A Yes. Another schedule --

Q I will withdraw the question.

A I'm sorry.

Q What was the purpose of preparing the schedule

115A?

A The purpose of preparing schedule 115A --

MR. BENDER: I object to that.

What his purpose was, going into the operation of his mind.

THE COURT: I will allow it for this limited purpose.

The Jury must understand that worksheets of Mr. Gerimia used in his examination is not in any sense evidence; that Mr. Gerimia, I assume, is presented here as an expert to express an opinion.

Normally, a witness may only tell the Jury what they saw, what they heard. One of the exceptions is that an expert may express an opinion or conclusion.

An expert is someone who by reason of training, education or experience, becomes expert in a specific field and based upon certain findings he may express an opinion.

Only because I anticipate that Mr. Gerimia will express an opinion, I think if he explains the purpose of the worksheet, it will better to explain the basis because I would charge you later and I will charge you now, that if an expert expresses an opinion based on certain findings -- he must make certain determinations

first -- just as a Jury makes fact findings -- based on that, he expresses an opinion or conclusion. He assumed certain facts in expressing the opinion.

Those are the very facts you will be called upon to pass upon. Suppose he assumes a material fact and later on you find the fact is not established, well, it's obvious that the expert expresses an opinion based on facts.

If an expert expresses an opinion based on a material fact that you find has not been established, then you must disregard that expert's opinion because he relied on a material fact and in doing that he doesn' know how you are going to find, so he must make certain assumptions.

If it turns out that you do not agree with him on the material fact, then you must disregard that expert's opinion as to that -- upon which he based that material fact that you found was not valid.

MR. BENDER: On that basis, your Honor, I object to the question certainly as to form, asking an expert what was the purpose --

THE COURT: Normally I wouldn't allow the question. I think it would be informative if the

Jury understands.

What the expert is doing is defining what a worksheet is. That definition I will allow.

MR. RYAN: I didn't interrupt you.

The expert is going to follow. My purpose in having Mr. Gerimia is to establish the worksheets that he prepared that will be relied upon later by the expert.

THE COURT: All right.

MR. BENDER: Why can't we ask him what he did rather than the purpose.

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(Continued on next page.)

THE COURT: I say I would allow you, Mr. Gerimia, to define what the worksheet is.

THE WITNESS: Sure.

THE COURT: Is it usually used in examination of an audit?

THE WITNESS: Yes, it is.

May I state what I prepared?

THE COURT: Yes.

THE WITNESS: All right.

I have prepared a worksheet headed Contracts of Sale, Closings in 1968. This is with respect to Story Book Homes, Inc. I listed the name of the buyer, the price, the job number, and the final contract price.

Now, I must comment on the final contract price. The final contract price is not necessarily the price of the house. The difference there is assumed to be extras. In other words, these two amounts are not --

MR. BENDER: I move to strike the assumption out, at least that portion.

THE COURT: Motion denied. I think it is an explanation of what the worksheets are.

Mr. Gerimia, are you saying that contract

price is not necessarily the price recited in the contract for the sale of the home.

THE WITNESS: That's correct.

THE COURT: It is the total price?

THE WITNESS: Total price.

THE COURT: And you labelled it "Contract price"?

THE WITNESS: Yes. I prepared a separate heading to show the contract price -- final contract price is contrasted with the price of the house.

BY MR. RYAN:

Q The jobs --

A The jobs are listed individually.

Q In the corporate books that you examined?

A Yes.

MR. RYAN: Thank you.

No further questions.

CROSS-EXAMINATION

BY MR. BENDER:

Q Could I just --

MR. BENDER: May I look at them?

MR. RYAN: Surely.

(Shown to counsel.)

MR. BENDER: Excuse me for a moment.

THE COURT: Do you want a recess at this point?

MR. BENDER: No, I don't think so.

BY MR. BENDER:

Q Mr. Gerimia, this folder --

MR. BENDER: May we mark the folder --

MR. RYAN: It is part of 115?

THE WITNESS: Yes.

Q Are there any more worksheets in connection with your audit contained in this folder which is marked 115 for Identification, any more worksheets?

A No. Is this the only folder that is marked 115 or 115A?

THE COURT: All the folders in that envelope are marked 115.

THE WITNESS: Then the entire folder is 115?

THE COURT: That's right.

THE WITNESS: The other worksheets that I have here are items that I found in my audit.

May I state what they are?

THE COURT: Just answer the question.

Q I am just asking you, there seems to be in that folder, particularly the schedule that you referred to -- there seems to be original worksheets and then there seems

to be copies -- photocopies of work papers.

Are the original work papers that are contained in there which seem to be greenish, all yours?

A May I look at them?

Q Please do.

A Some of all the green ones -- I will state that all of the work papers prepared on green paper is mine. There is one here that was prepared on lighter paper which is not mine.

THE COURT: Would you mark the one that Mr. Gerimia says is not his 115B.

THE CLERK: So marked.

(So marked.)

THE WITNESS: This one is called Jobs in Process, Closing Inventory. That was not prepared by me -- this one here (indicating).

Q Are you able to tell both from the handwriting on the schedules which are yours?

A Yes.

Q Is there also another indication on those schedules which indicates that it is yours?

A Yes.

Q What's that, dates -- the dates that appear on top of the schedules indicating --

A Well, there is a rubber stamp on each sheet indicating the name of the taxpayer, the year, the page number, date prepared by -- date prepared and initials and the items.

Q Is that the date on which you prepared the schedules -- the date that appears at the top?

A May I point out that some of these dates were filled in not by me --

Q By somebody else?

A Yes. This is not my handwriting.

Q Is there anything to indicate the date upon which you prepared the schedules?

A It should be contained in my activity record sheet.

Q Do you have that?

A Well, the activity record sheet is attached to the front part of the folder.

Q Are you telling us that the date that was put in on top was put on by somebody else later on?

A May I mention with respect to this one it was put in by someone else.

Q This one is referring --

A Inventory, Jobs in Process, I'm sorry.

Q That date that appears in here --

A That's not my writing.

Q 10/6/70; is that right?

THE COURT: You are referring to a paper already marked?

THE WITNESS: No, it hasn't been marked.

THE COURT: Every unmarked sheet that you refer to in your testimony should be identified by another marking. That is what we mean by identification so the records reflect what the witness is talking about.

Mark that 115C for Identification.

THE CLERK: So marked.

(So marked.)

THE WITNESS: This is not mine either.

BY MR. BENDER:

Q That's the next page.

A That's not mine.

Q That's the third page?

A Fourth.

Q Not yours?

A No, sir. This is not mine.

Q That was '73 and you were sort of off the audit by then?

A Yes.

MR. BENDER: Could we mark these four because they are actually your schedules?

THE WITNESS: That's right.

THE CLERK: So marked as Government Exhibit 115D for Identication.

(So marked.)

THE WITNESS: Three of them --

THE CLERK: Four.

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(Continued on next page.)

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Q Did you want to do that with any other of your schedules, while the Clerk is here?

A Here's another one (indicating).

Q That's your schedule, but somebody else put the date on top?

A They got the information from my activity record --

MR. BENDER: I object to that and move to strike it.

THE COURT: Strike out, "they got the information from my activity record."

THE WITNESS: This is not mine, but this is, that is, this is not (indicating).

THE COURT: Do I understand the only schedule the Government is going to rely on is the schedule of the 92 homes?

MR. RYAN: Yes.

MR. BENDER: I can't tell what they are going to do.

THE COURT: Mr. Ryan says the only schedule that they are going to rely on is the one that he testified to, 115-A, consisting of a recording of the 92 homes that has the name of the purchaser, the price, plus the extras which he described --

MR. BENDER: No, no, I think the witness testified -- unless I misunderstood him and I probably may have --

MR. RYAN: May I state --

THE COURT: The jury may be excused.

(Jury leaves courtroom.)

THE COURT: I don't understand the mystery.

MR. BENDER: This schedule is not the schedule of the 92 buyers.

MR. RYAN: It is Story Book Homes.

MR. BENDER: It is only Story Book Homes.

THE COURT: Would you sit down, Mr. Hornberger.

MR. HORNBERGER: I am trying to relax.

THE COURT: How many homes is listed there, just the Story Book Homes?

MR. RYAN: That's correct.

THE COURT: How many?

MR. BENDER: Thirty-nine.

THE COURT: How about the total of 92?

MR. RYAN: I will have to call another revenue agent that did the same with the other corporate records.

MR. BENDER: I don't know that.

THE COURT: Why ask him all that? He only

referred to one schedule.

MR. BENDER: Judge, I think in asking for the date -- if you give me a chance -- I think it will be relevant. Merely out of having the witness available here is the reason I am trying to have him identify all of his work sheets. They may become very material, since the next revenue agent is going to testify that he relied upon these.

THE COURT: Will you be here until the next witness testifies?

Who are you going to call as the expert, Mr. Mazzella?

MR. RYAN: Mr. Valardi.

THE COURT: I don't understand. Don't you agree as to the contract price, the extras as to each house, the total?

MR. RYAN: No, he doesn't.

MR. BENDER: There are problems.

MR. RYAN: Le me state --

THE COURT: We are talking about documents.

MR. BENDER: Yes.

MR. RYAN: If I may, the reason I am going through this procedure is because Mr. Bender indicated before we even picked the jury that he is going to

contest the allegation of extras made by the Special Agent. The Special Agent made the allegations based on an investigation of the records, one of which is the work sheets of these revenue agents that examined the corporate books for each job.

THE COURT: All right, bring the jury in.

My purpose in limiting examinations on this -- on what appears now to be collateral matters -- would only be admissible on the question of credibility.

In a complicated commercial transaction of this kind, I have an obligation to keep the collective jurors' eyes focused on the issues and not whether someone else put the date on -- got the date from his activity record.

MR. BENDER: I think you will find, your Honor, and I do appreciate what you are saying that it is just these very collaterals on which the Government seeks to rely to prove the intent in this case.

THE COURT: You mean whether the individual in the Internal Revenue Service who put the stamp on and said he made the schedule and took the date from the activity record --

MR. BENDER: The dates may become important.

THE COURT: Everything may become important.

I assume you have some information.

MR. BENDER: I do and you don't. I have an idea of what is coming.

THE COURT: On the theory that there is nothing that I know about or on the horizon that Mr. Bender knows about, I will permit the examination on what appears to be pure minutiae.

MR. BENDER: I will be brief.

THE COURT: All right, seat the jury.

(The jury entered the jury box.)

THE COURT: All right, you may proceed, Mr. Bender.

BY MR. BENDER:

Q Mr. Gerimia, did you also -- by the way, when did you cease your activities in connection with the audit?

A I would have to look at the activity record sheet.

Q Would you have it here?

A Yes.

With respect to Story Book Homes, Incorporated, I ceased my activity on August 26, 1970.

Q And you are reading from --

A I will have to correct that. The receipts are placed in reverse order. October 8, 1971. This is one

week prior to my retirement.

THE COURT: Apparently I misspoke. Your work-sheets related only to Story Book Homes, Inc. and that consisted of how many?

MR. BENDER: I think the sheet is marked 115-A for Identification.

THE WITNESS: I see.

(Continued on next page.)

THE COURT: Isn't it in the back?

THE WITNESS: I see 115B, C. Where is A?

THE CLERK: It's in the back.

THE COURT: Suppose you put a clip in there.

THE CLERK: Yes, your Honor. Here it is.

MR. BENDER: I had nothing to do with it, Judge.

THE WITNESS: 39 sales listing are on this sheet.

MR. BENDER: Did you want to ask --

THE WITNESS: 39, that's right.

BY MR. BENDER:

Q Yes. You followed the names down along on that sheet, each sheet, and it is numbered, isn't it, the shee is numbered "1" to "39"?

A Yes.

Q On each line you have a buyer, is that it?

A Yes. That's right. Each name is listed alongside of a number.

Q I see.

Now, do I understand that you just made that schedule with respect to Story Book Homes for 1968?

A This particular schedule was only made with respect to Story Book Homes, Inc., that's right.

Q Did you make any similar schedules with respect to the other corporations?

A No, I did not.

Q And did you make any schedules with respect to the individual, Mr. Hornberger, personally?

I'm talking about 1967, for 1967 in 1968.

A Well, with respect to Mr. Hornberger -- you're relating to Mr. Hornberger's personal return?

Q Yes.

A Well, I made certain notes in connection with his '67 and '68 personal return.

Q Which is a part of your work papers?

A Well, it may not be in this -- these work papers. I think they're separate work papers.

Q Are those papers that you have in your hand on -- refer to the corporations?

A These just refer to the corporations.

Q As far as your audit is concerned, you only made a schedule with respect to Story Book Homes for 1968?

A Well, I also examined the other corporations butI did not make similar schedules with respect to the other corporations.

Q Was --

A In other words, I went into each corporation

but when it came to the preparation of the contracts of sale, I just limited it to Story Book Homes.

I must explain, your Honor, I was forced to retire and curtail my work. I was forced to retire on advice of my physician. So I had to drop the examination, submit my findings to the office.

Q I see. And that explains the reason why you didn't continue on the audit?

A Why I didn't prepare similar schedules with respect to the other corporations.

Q Very good. All right. At least with respect -- at least with respect to what you did do, with regard to the corporations, the corporate books and records were available to you and you examined them?

A Yes.

Q Since the corporate books themselves referred -- listed only job numbers without names of buyers, you had the contracts and the closing statements available to you as well?

A Yes.

Q Is that right?

A That's right.

Q And you also had the job files, did you not?

A Yes, that's right.

Q All right.

By the way, the audit that you started in on originally, was that assigned to you in the regular course of business? Were these returns pulled out in the regular course of business and assigned to you for audit?

A May I confer with Mr. Ryan on that?

THE COURT: The Jury may be excused.

(Jury excused.)

THE COURT: You may step down, Mr. Gerimia.

(Witness confers with Mr. Ryan.)

MR. BENDER: May the record indicate that the witness is conferring with counsel.

THE COURT: Yes.

MR. RYAN: Yes.

THE COURT: He did that for about three seconds.

MR. RYAN: Thank you.

THE WITNESS: Yes.

MR. RYAN: We are ready to proceed.

THE COURT: All right.

THE WITNESS: This is my first talk with Mr. Ryan, so --

THE COURT: You have never spoken to him before?

THE WITNESS: Well, I spoke to him only --

THE COURT: Wait a minute. The Jury is coming in.

THE WITNESS: I'm sorry.

THE COURT: Go ahead.

THE WITNESS: No. I spoke to him yesterday because -- last night. He told me come in as a witness, yes.

THE COURT: Didn't you go over your testimony with him?

THE WITNESS: Yes, this morning I did.

THE COURT: All right.

THE WITNESS: I came in very early. He was up all night.

Now, with respect to --

THE COURT: Don't say anything.

Wait until the Jury comes in.

THE WITNESS: Oh, I'm sorry. I thought this was off the record, so to speak.

THE COURT: No. Nothing is off the record.

THE WITNESS: All right, sir.

(Jury present.)

THE COURT: All right. Will you repeat the question, Mr. Rudolph?

(Question read.)

BY MR. BENDER:

You indicated that you wanted to consult with Mr. Ryan, counsel; is that right?

A Yes.

Q did you?

A Yes, I did.

Q Are you prepared to answer that question?

A Yes, I'm prepared to answer it.

The returns were assigned to me as a result of an informant's communication.

Q And was that informant Mr. Greshin?

A I believe it was, sir. It was an attorney who represented one of the buyers.

Q And who advised you of the communication with respect to Mr. Greshin's letter to the Internal Revenue Service or the communication that was made to the Internal Revenue Service?

A Who advised me?

Q Yes.

Did you speak with the special agent?

A No. No. There was no conference with the special agent at the time.

Q But this --

A This letter -- this letter was attached to the -- to the -- in the folder with the tax returns.

Q Well, this -- this was sent down to you as a sort of special investigation in view of the informant's letter; isn't that right?

A Well, I won't say it was a special investigation. This is more -- more or less routine.

MR. BENDER: I move to strike it out.

THE COURT: No. I will allow it to stand.

MR. RYAN: No. I object to striking it.

BY MR. BENDER:

Q All right. You mean it was routine in the sense that very frequently you go in on an audit because an informer has informed against a taxpayer?

A Yes.

Q That is frequent?

A No. It isn't frequent at all. But the -- the routine, why I consider it routine is because nothing may come out of these allegations.

Q Mr. Gerimia, under the routine procedure in which you make an audit, the tax return is assigned to you by your group supervisor; isn't that right?

A That's correct.

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CROSS-EXAMINATION

BY MR. BENDER: (Cont.)

Q And your group supervisor gets that return just as a whole batch of other returns, from some classificatic division in your office; is that right?

A That's right.

Q And those are pulled out at random, are they not?

A Well, I don't know what criteria they use for pulling out these returns.

Q But when you get it, when you get it, as far as you know, there is nothing -- nothing attached to the request for the audit other than some items on a particular return which you are going to look into; isn't that right?

A Well, ordinarily, in a routine examination, there -- there are sometimes a sheet indicating which items to check.

Q And sometimes not?

A And sometimes not, that is right.

Q All right. That's routine; is that right?

A That is routine, that is right.

Q But it's not routine to get an audit with an informer's letter attached?

A I consider it routine.

THE COURT: Objection sustained to any further questions. It's argumentative.

BY MR. BENDER:

Q Now, were you given instructions as to what to specifically look for with respect to the informer's complaint?

A No.

Q Did you advise the taxpayer's representative when you went in on the audit that you had an informer's letter which was -- which -- in which the informer was claiming certain things?

A No, I did not.

He asked me, I would have answered in the affirmative.

Q How would he know it if you didn't tell him?

MR. RYAN: Objection.

THE COURT: Sustained. Argumentative.

Q Did you feel there was an obligation on your part to have advised him of that fact?

A No, not at that -- no, not at all. If the -- if the accountant had asked me the question I would have answered it, yes. This is what I said.

Q I take it, that you didn't mention this fact to either Mr. Canale or to MR. Hornberger?

A No, sir. I did not apprise him of the fact that

in my folder was a letter from this attorney.

MR. BENDER: I have no further questions.

REDIRECT EXAMINATION

BY MR. RYAN:

Q The jobs listed on your on your work sheet in connection with Story Book Homes, were they the jobs which were the basis for the income reported by Story Book Homes?

A Yes.

The jobs --

Q That's enough. Thank you.

A I'm sorry.

Q Thank you.

THE COURT: Anything further?

THE WITNESS: I don't want to go any further.

MR. BENDER: One second, please, your Honor.

Can we have that question and answer reread, your Honor, please?

THE COURT: Yes.

(Record read.)

THE COURT: Anything further, Mr. Ryan?

MR. RYAN: Nothing.

RECROSS-EXAMINATION

BY MR. BENDER:

Q Are you talking about the schedule when you -- been identified as --

THE COURT: 115A.

Q -- 115A?

A Yes.

The schedules that -- that are identified by 115A are the jobs of the homes that were sold and the amounts of which compare with the amount reported on the return.

Q You have a column here, you have a name of a buyer?

A Right.

Q This price, you have a column which is headed "Price."

A Right.

Q A column headed "Job Number"? A column headed--

A Subtotal.

Q -- "Subtotals and Final Contract Price"?

A That is right.

Q Now, which column are you saying was the column which reflected the price that was listed in the corporate book as the sale price of the house made by that corporation?

A If these totals are correct, I would say that the column marked subtotals is the figure that was listed as

income to the corporation.

I'd have to verify it. Let's see. I can tell-- I can tell right away by going through this. Yes. All right.

Q Well --

A Yes. I'll answer that question, because the last digit is zero, I am confident that that is -- that the figure reported on the corporate books is the total of the figures under price,in this particular column.

THE COURT: Under the heading "Price"?

THE WITNESS: Price.

THE COURT: All right.

THE WITNESS: But then again, your Honor, I would have to total this on the machine to make sure because I haven't looked at this schedule in about close to four years.

But I'd rely on this -- on the schedule as being correct.

MR. BENDER: I have no further questions, your Honor.

MR. RYAN: Thank you, Mr. Gerimia.

THE COURT: You may step down.

(Witness excused.)

THE COURT: NExt witness.

THE WITNESS: Your Honor, do you want me to

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remain until the other agents --

MR. BENDER: May we have him?

THE COURT: Yes.

MR. BENDER: If you don't mind, Mr. Gerimia.

THE COURT: You may remain.

THE WITNESS: The reason why I say that --

THE COURT: Don't give me the reason.

THE WITNESS: All right.

THE COURT: You may sit in the courtroom, if you wish.

THE WITNESS: All right.

(continued next page.)

THE CLERK: Come forward, please.

A N D R E W V I L A R D I , called as a witness herein, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RYAN:

Q Mr. Vilardi, would you tell us your occupation, sir?

A I am an Internal Revenue Agent.

Q And how long have you been an Internal Revenue Agent?

A I have now been an Internal Revenue Agent for a period of six years and ten months.

Q And did you have occasion in the course of your duties to be assigned to conduct a review of Elmer E. Hornberger's returns?

A I have.

Q And his corporations' returns?

A I have.

Q And in the course of your assignment, did you have occasion to review corporate records?

A I did.

Q In the course of your assignment, did you

have occasionto prepare schedules based on corporate or any other records?

A I did.

Q In the course of your review, did you attempt to ascertain what jobs were attributable to the income reported by each corporation?

A I did.

Q How did you ascertain that, what did you do?

A Number one, I sat down with Mr. Canale, reviewed his various corporate records, determining what particular job numbers were assigned to what -- to the related corporate -- corporations.

With that information I then tried to correlate these job numbers to the various buyers, who bought these respective houses, using third-party records.

Q WHat were the third-party records you relied on?

A Some of the third-party records --

MR. BENDER: I object to that, your Honor.

THE COURT: Well, whose records were the third-party records?

THE WITNESS: The third-party records were Roosevelt Savings Bank statements.

MR. BENDER: I object to that and move to strike

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it. Pure hearsay, not binding on the defendant.

THE COURT: No.

MR. RYAN: No.

(continued next page.)

...mb 2/3 1 1 THE COURT: The jury may be excused.

(The following occurred in the absence of the jury.)

THE COURT: When you refer to the Roosevelt Savings Bank records, of course you are referring to the building loan advances and the final advance made at the time of title closing?

THE WITNESS: That is correct. These income statements.

THE COURT: Now, I must have some proof on the record that these records of the Roosevelt Savings Bank relate to the houses, of course. Do we have the Roosevelt Savings Bank records?

MR. RYAN: We certainly do.

THE WITNESS: I believe we have them.

THE COURT: What is the secret?

MR. RYAN: Mr. Bender has them.

MR. BENDER: You know, Judge, this man's testimony, that he went to a bank and he examined the bank's records and based upon that he's testifying here, is pure hearsay.

THE COURT: Wait now.

MR. RYAN: No.

MR. BENDER: That's what he said.

THE COURT: That is one of the exceptions to

the Hearsay Rule. Of course it's pure hearsay.

MR. BENDER: I made my --

THE COURT: They are records made in the regular course of the bank's business.

MR. BENDER: It's no different, Judge, than if he went to some third party, to the buyer, and he said to the buyer, "Let me see your record," and the buyer writes out something and he says, "I spoke to the buyer and the buyer gave me this."

It's objectionable, but I --

THE COURT: Objectionable?

MR. BENDER: It's completely objectionable.

THE COURT: You said objectionable on the ground of hearsay.

MR. BENDER: Of course.

THE COURT: I say, it's not objectionable on the ground of hearsay. It is one of the exceptions to the hearsay rule.

MR.BENDER: But a man from the bank --

THE COURT: Excuse me. It is clearly a business record. It's a record that's recorded in the County Clerk's Office of Suffolk County. This was Suffolk County, right?

MR. RYAN: Yes. The bank loan isn't. The deed is, but the bank loan isn't.

3 THE COURT: Oh, the mortgage and building loan agreement certainly are recorded.

MR. RYAN: I didn't say the --

THE COURT: Now, there is only failure in the chain, and if you can supply the link, then you have it, that these records related to the respective houses.

MR. RYAN: He did.

THE COURT: The point is that these records may be more reliable than the taxpayer's records. We are talking about reconstructing income. Do you think that the Government is confined to the books and records of a taxpayer to determine taxable income?

MR. BENDER: Of course not.

THE COURT: Of course not.

MR. BENDER: Of course not, but on specific items they have to put it in by direct or circumstantial proof. There has to be a foundation. A man from the bank has to come here.

MR. RYAN: Is that what you want us to do?

MR. BENDER: Just a minute.

THE COURT: No. On the representation that you can prove that the records accurately reflect the advances made by the Roosevelt Savings Bank -- was it the Roosevelt Savings Bank?

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THE WITNESS: Yes, sir.

MR. RYAN: Right.

THE COURT: I will allow the witness to testify.

MR. RYAN: We so represent. They had been made available to Mr. Bender for the past four months. He has copies of them.

THE COURT: How could it be otherwise? And I assume that those advances are recorded in the books and records of the corporation.

MR. RYAN: Yes. Is that correct?

THE WITNESS: That is correct.

THE COURT: I cannot imagine -- I do not know how they could be left out.

MR. BENDER: I didn't say that they should.

THE COURT: What is the dispute about?

MR. BENDER: I can only object to the procedure. I am required to do so on behalf of my client. If you overrule me, you overrule me.

THE COURT: No.

MR. BENDER: There is -- I can only see a proper way to put in proof. We are not trying to -- this is not a case of reconstructing income.

THE COURT: If you were talking --

MR. BENDER: It's not a net worth case.

THE COURT: If you are talking about books and

records of someone who wasn't in the business, a third party, whose reliability wasn't established, I would say, "Well, you've got something. If he based it on that, I think that's pure hearsay."

But books and records concerning advances of a bank relating to these houses?

MR. BENDER: I have stipulated with Mr. Ryan under certain circumstances, so that he didn't have to bring in a bank representative, particularly with checks or anything else. If he had asked me pre-trial, so stipulate, I may have, but he hadn't.

THE COURT: He is asking you now.

MR. BENDER: Therefore, I feel that I have to. I have a duty to object to evidence if it's improperly put in.

THE COURT: Of course that's up to you.

MR. RYAN: I'll have to dispute one fact. When we had this pre-trial, I wanted to mark bank statements as well in connection with each one of these 93 transactions.

MR. BENDER: This has nothing to do with transactions.

MR. RYAN: Let me ask you one question, Mr. Bender. Do you have any information which would indicate that these bank -- that if a bank officer

6 were called, he could not testify that these were --

THE COURT: I am not going to ask -- to embarrass Mr. Bender by asking him to stipulate. He may feel it is necessary for the protection of his client.

I just cannot conceive of why an objection is made to the introduction of bank records, except if the claim is that they don't relate to the specific houses or to follow through on Mr. Bender's theory, that the bank records might establish the Government's position, that the allocation was consistent with the counts in the indictment.

Except for that, I can't understand the objection.

At any rate, as a matter of law, I overrule it, on the representation that the Government will be able to link up the bank records with the specific houses that the witness will testify to.

MR. RYAN: Fine. We so represent.

MR. BENDER: And I might point out to your Honor, that this is a very vital part of the Government's proof, because their function now is to establish that the extras which they claim were omitted from each corporation applies to that corporation. Because under each count in the indictment, it's

7 the specific corporation's income that's being charged as omitted. So the way in which they do link it up becomes a very vital part of the Government's proof.

THE COURT: Of course I will listen to that with a greater degree of interest when I learn a little more about the allocations.

MR. RYAN: Right.

THE COURT: There is no charge unless it was made in the bill of particulars that Mr. Hornberger, as President of Story Book Manor, Inc., for example, failed to report as income $2342 as extras on job No. 42.

The charge is that he failed to report some $12,994.42 for the year 1967.

My recollection is that the sum is not a -- an essential element of the crime, for the Government to prove, that if they had proved that substantial -- that he must prove that substantial taxable income was withheld. I don't know if they proved that it was only $8,000 or $5,000, but that is fatal to the Government's charge.

However, at the end, when I know the figures, I will listen to argument.

I intend charging the jury that the essential element of the crime charged is that they must prove

that substantial income was not included in the return, not that -- that they must prove it was $12,994.42.

MR. BENDER: Merely to refresh you recollection, your Honor, which I'm sure doesn't need to be refreshed --

THE COURT: Oh, it certainly does.

MR. BENDER: At the pre-trial conference it was made clear both by me and Mr. Ryan that the method by which the Government is proving the omitted income in each corporation for each corporate year listed in the indictment is the omission of specific items of extras.

THE COURT: All right. That does not mean that becomes an essential element of the crime, because they said that they intend to prove that specific items of extras were omitted.

MR. BENDER: Sure, it does.

THE COURT: It does?

MR. BENDER: In other words, they can't --

THE COURT: That may be point one in your appeal, if the defendant is convicted. I don't see it that way.

MR. BENDER: What I mean by that, the purpose for the Government mentioning that in the form of the bill of particulars is that it cannot prove the

9 deficiency with respect to any other item.

THE COURT: Do you understand that your bill of particulars bound you to prove the exact amount of extras?

MR. BENDER: Oh, no. not exact, your Honor. I agree with you. I agree with your definition, that it is a substantial amount of tax that has to be omitted, not the precise 100 percent.

THE COURT: You referred to "bill of particulars." In what form was that bill of particulars?

MR. BENDER: We made the stipulation here in the pre-trial, that based upon my discovery and my -- with Mr. Ryan, preliminarily to his case, and my discussion with him on the theory of the Government's case, the Government was simply limiting itself to prove the omitted income in the indictment to omitted specific items of extras.

THE COURT: I do not know what you mean by "specific items of extras."

MR. BENDER: There is a difference.

THE COURT: I thought the understanding was that the omitted income related to extras and nothing else but not that they had to prove as to each count the specific extras and the amount of each extra and that the total was correct, which seems to be what

you are arguing.

MR. BENDER: No, I don't think so. I am not making myself clear, Judge.

I'm saying that they are limited in their proof of the omitted income, to proof of extras.

THE COURT: Right.

MR. BENDER: Now, that extra, the total amount of the extras which they claim were omitted from corporation Dotal, for example, if they charge that the amount was $15,000 in the indictment, just taking a figure out of the hat, and prove, however, less than that for a substantial amount, I concede that that would be all right.

I'm simply trying to say to you that they must prove that Dotal had omitted extras of a substantial amount as charged in the indictment, and so did the other corporations, and not prove a deficiency based upon an improper deduction or a disallowance of a deduction or an increase in -- through bank deposit method or something like that, which would be reconstructing income.

Do you follow me?

And that's why I'm getting back to him. This is not a circumstantial method of proof case.

THE COURT: Let me say this: I understand the

11 Government's theory to be that the evasion and false filing was due to the failure to report income from extras.

MR. BENDER: That's right.

THE COURT: Now, you are, in my opinion, expanding on that information given by the Government by confining the Government to a specific theory. Now, I do not know whether Mr. Ryan agrees with that, but, as I say, I will hear that argument after I hear the testimony. There may be no variance or it may be a fact question for the jury. But I think I hear a variation of theories rather than a dispute as to where the income, the unreported income came from. Am I right?

MR. BENDER: I'm afraid, as usual, I didn't make myself quite clear.

THE COURT: All right. Let's wait until --

MR. BENDER: I dare say --

THE COURT: Let's wait until I hear the case and maybe I'll understand you better when I hear the case.

Rephrase your question, Mr. -- referring to bank records, whether -- instead of third parties. Ask the specific question, did you rely on bank records.

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(The jury thereupon returned to the courtroom.)

DDS:bd
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M R . V I L A R D I , called as a witness, having previously been duly sworn, resumed the stand and testified further as follows:

THE COURT: You may continue, Mr. Ryan.

DIRECT EXAMINATION (continuing)

BY MR. RYAN:

Q Before we took the recess, Mr. Vilardi, you were telling us how you prepared the schedule concerning jobs performed as reported by the corporations? Is that correct?

A Yes, that is correct.

Q You told us you had reviewed the corporation's records with Mr. Canale? Correct?

A Yes.

Q You also told us you reviewed certain bank records.

A That is correct.

Q What bank records?

A I reviewed the bank records of the Roosevelt Savings Bank.

Q Now, what did you do with the bank records?

THE COURT: No. What records were they?

THE WITNESS: These were the Roosevelt Savings Bank statements which showed the names of the various

corporations and amounts advanced to them, and the job numbers in some instances, and also names of the prospective buyers.

Q Now --

MR. BENDER: I don't have to repeat my objection which you overruled.

THE COURT: Yes. That is on the representation by the Government that they would produce the specific records and that they will be offered in evidence.

(Mr. Ryan nods in the affirmative.)

BY MR. RYAN:

Q What did you do in the course of your review in preparation of your worksheet with the bank records and the corporate records?

A Okay. I listed -- I analyzed the various Roosevelt Savings Bank statements and I broke them down into the various corporations that were shown on the face of the statement. Once I had the statement broken down by corporations I then analyzed each division of statements by corporations as to the various job numbers and the names of the prospective buyers. I made a list of these.

Q All right.

A I then took this list and sat down with Mr. Canale, auditing the general ledger, and tried to

correlate those particular job numbers shown on my schedule now with the job numbers shown on the general ledger. And in most cases they would agree.

Q All right. And did you prepare any schedule by reflecting jobs relating to each corporation?

A I did.

Q Now, would you look at the folder before you, look at 115, sir; it is a folder that contains five folders. Pick out for us the schedules that you prepared.

A 115? Okay.

(Witness examines documents.)

Q Do you have it?

A Yes.

MR. RYAN: I would like to mark it as 115.

THE CLERK: D.

MR. RYAN: D.

THE CLERK: For identification.

(Document referred to was received and marked Government's Exhibit 115 D for identification.)

Q What corporation does that schedule relate to?

A This corporation is called Horn Enterprises, Inc.

Q Will you take another folder out and see if you can find another schedule.

MR. BENDER: Excuse me. Can we find what year that pertains to that Mr. Ryan just mentioned.

MR. RYAN: Answer the question.

THE WITNESS: This here pertains to the year 1967.

MR. BENDER: Thank you.

Q Did you prepare any other schedules in this fashion?

A I believe I may have.

Q For that particular corporation?

A For this particular corporation? If I can review the record and refresh my memory?

Q Go ahead.

A I did.

Q What year?

A This would be for the year 1968.

MR. RYAN: May I mark it as 115 E.

THE CLERK: So marked for identification.

(Document referred to received and marked Government's Exhibit 115E for identification.)

Q All right, now would you look at your other folders and tell us whether or not you prepared any similar schedules for any of the other corporations?

A I have another one in front of me.

MR. RYAN: Will you mark that as 115F.

(Document referred to was received and marked Government's Exhibit 115F for identification.)

Q What year does that relate to and of what corporation?

A I'm trying to find the year now. This relates to the year 1967 and the name of the corporation is called Dotal Building Corporation.

Q Do you have a schedule for the year 1968 for that corporation?

A If I may have a minute to look for it.

THE COURT: Please put a paper clip on those documents.

THE WITNESS: Yes, there are.

THE COURT: Have you? All right.

THE CLERK: Latter schedules marked Government's Exhibit 115F for identification.

(Document referred to is received and marked Government's Exhibit 115F for identification.)

THE WITNESS: I also have another one for the year 1968.

THE CLERK: So marked as Government's Exhibit 115G for identification.

(Document referred to is received and marked

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Government's Exhibit 115G for identification.)

Q All right, would you look at your other folders and see whether you prepared any other similar schedules for the other corporations.

THE WITNESS: May I make a statement at this time? I have a schedule here for Elpa Builders.

MR. RYAN: I'm not interested in Elpa Builders.

THE WITNESS: All right.

A I have another schedule here -

Q What corporation?

A The name of the corporation is Story Book Manor, Inc.

Q What year does it relate to?

A The year is 1967.

MR. RYAN: May I mark it please.

THE CLERK: So marked as Government's Exhibit 115H for identification.

(Document referred to was received and marked Government's Exhibit 115H for identification.)

Q Do you have a similar schedule for the year 1968?

A May I look please?

Q Yes, surely.

A There is a schedule prepared by me based on Mr. Jeremiah's work paper.

Q For what corporation?

A This is for Story Book Manor, Inc. and the year is 1968.

THE CLERK: So marked as Government's Exhibit 115I for identification.

(Document referred to was received and marked Government's Exhibit 115I for identification.)

Q Will you tell us what you mean when you say it was prepared by you based on Mr. Jeremiah's work paper.

A It is a listing of job numbers, names, the various amounts, prepared by Mr. Jeremiah which I used as the basis in conducting my audit with Mr. Canale to confirm the various jobs -- related jobs, names and amounts shown on this schedule.

Q Did your examination of the corporate records show that the schedule that Mr. Jeremiah had prepared was accurate.

A It did.

Q How about the bank statements, did that also show it was accurate?

A It did.

MR. BENDER: Excuse me. What bank statements are we referring to?

Q What bank statements are we referring to?

A Then we were referring to the Roosevelt Savings Bank statements.

MR. RYAN: May it be marked.

THE COURT: Are you saying that the information you received from the records of the Roosevelt Savings Bank were confirmed by the information you received from the books and records of the various corporations?

THE WITNESS: Yes, we confirmed them.

THE COURT: All right.

THE CLERK: Schedule marked Government's Exhibit 115J for identification.

(Document referred to was received and marked Government's Exhibit 115J for identification.)

Q All right, what year did they relate to?

A It is related to the year 1968. This is Mr. Jeremiah's schedule (indicating).

Q I want your schedule.

A This is mine (indicating).

MR. RYAN: In other words 115I relates to the year 1968 prepared by Mr. Vilardi and the related particular schedule of Mr. Jeremiah, which I will mark as 115J.

Q Now, did you prepare any other schedules on this particular subject of jobs for this particular

corporation, Story Book Manor?

A For this particular corporation in relation to jobs?

Q Yes.

A I don't believe so.

Q Did you prepare any similar schedules for any other corporations?

A I prepared -_ outside of what I went over here with you.

Q Well, we have gone over Story Book Manor; we reviewed Dotal Building Corp; we reviewed Horn Enterprises.

A Based on these corporations I prepared no other schedules based on jobs.

MR. RYAN: I have no further questions.

MR. BENDER: I guess I ought to look at those, your Honor.

THE COURT: Do you want a recess?

MR. BENDER: Is this an appropriate time?

THE COURT: We will take a short recess. When you are ready please advise the Clerk.

(Short recess.)

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(Continued next page)

THE COURT: If you intend to take any substantial amount of time, I will excuse the jury for lunch.

MR. BENDER: To save time, I could move as much or near lunchtime as possible.

With your permission, Mr. Ryan indicated that Mr. Gerimia has a medical situation that he wishes to take care of. I would put him on and ask him one question about a document and then excuse him. Mr. Ryan said he's appreciate if we could do that.

THE COURT: All right, seat the jury.

(Jury present.)

P E T E R E . G E R I M I A , resumed and testified further as follows:

THE COURT: We will interrupt the questioning of Mr. Valardi and Mr. Gerimia will return to the witness stand for some questioning by the defendant.

MR. BENDER: May we mark this for identification?

THE CLERK: Three-page document marked Defendant's Exhibit P for Identification.

RECROSS EXAMINATION

BY MR. BENDER:

Q Mr. Gerimia, I show you P for Identification. Was that a statement issued -- withdrawn.

Was that a statement given to you by Mr. Canale at your

request?

A Correct.

Q Was it given to you at the time you were conducting your audit?

A Yes.

MR.BENDER: May I offer that into evidence?

MR. RYAN: No objection.

REDIRECT EXAMINATION

BY MR. RYAN:

Q Can you tell us the circumstances under which that statement was given to you --

THE COURT: Are you through with your questioning?

MR. BENDER: Yes.

THE COURT: You say you have no objection to this?

MR. RYAN: I just want to elicit the circumstances.

THE COURT: Go ahead.

It may be marked.

THE CLERK: Defendant's Exhibit P, previous marked for Identification, now marked in Evidence.

Q Would you tell us the circumstances under which Exhibit P was given to you.

A During the course of the examination of the various corporations I had asked the accountant, Mr. Thomas Canale, to justify the payment of wages which according -- according to my recollection were deemed to be excessive and also to justify the expenses that Mr. Hornberger incurred in the conduct of his business. He enumerated the various duties that he performed and he stressed the fact that his wife did not draw a salary,but her compensation was included with his. This is purely an audit function to determine whether or not the salaries paid were excessive, in which case the agent would disallow it and pick it up as a dividend to the stockholder recipient and he enumerated the various duties that he performed, stating that if he had to hire other people that he would have to pay an additional amount for their services.

These are the circumstances under which I asked for this statement -- this is a normal thing in the examination of a corporation.

Q Did you make any determination as to whether Mr. Hornberger's salaries were excessive or not?

A I don't recall at the present time, but if I deemed that they were excessive at the time, and if I had stayed with the case, I would have still had deemed them excessive.

Q You do know, do you not, that there has been no contention here --

THE COURT: This isn't in the case at all.

MR. BENDER: Only because he asked him.

THE COURT: Would the jury be excused.

(Jury leaves courtroom.)

THE COURT: On what possible theory can you offer this and you, Mr. Ryan, why would you for any reason consent that something like this be admitted into evidence? If you talk about hearsay, can you think of more extraneous hearsay than this glorifying Mr. Hornberger in saying he earns a salary when salary deductions are not an issue.

Then when Mr. Gerimia apparently didn't give you the right answer, now we are going into an examination whether he earned his pay.

MR. BENDER: There is nothing to implicate in the record that Mr. Hornberger was justifying his salary. It was only when Mr. Ryan asked the question on cross-examination that that question came out and all I was trying to do was not to leave the impression on the part of the jury that he took excessive salary.

THE COURT: I am only leaving it in because the Government allowed it. I am not going to allow

any other extraneous matter to come into the case, even on the consent of the United States Attorney.

MR. RYAN: I was not consenting to extraneous matter. I have no objection to this.

THE COURT: Why?

MR. RYAN: Because I think it helps the Government.

THE COURT: I only am concerned if it is relevant to the issues.

Is this case going to depend on whether Mr. Hornberger earned $80,000?

MR. RYAN: It is not. That is why I object to any questioning whether he made a proper determination or made any determination about salaries.

MR. BENDER: I couldn't leave the jury to think --

THE COURT: Once you start it, you can't finish it. That is the trouble with collateral matters. That is the purpose of my excluding extraneous matters.

Now the jury is going to consider whether Mr. Hornberger took a proper deduction when he took $80,000 for 1968. It doesn't belong in the case. We have 92 transactions concerning extras.

MR. BENDER: I would ask your Honor to charge the jury that there was no issue in the case about any salary.

THE COURT: I will entertain a motion to strike it from the record.

MR. RYAN: If you are not going to press the issue as to salary, I will move to strike it.

THE COURT: Do you oppose it?

MR. BENDER: I want it in.

THE COURT: Do you move?

MR. RYAN: On the basis that that's the offer, I make the motion.

THE COURT: On that motion, I will strike it.

MR. BENDER: What will you strike?

THE COURT: That Mr. Canale said Mr. Hornberger is a fine man and he works very hard and earns $80,000 and he earns it fairly. I will strike from Mr. Gerimia's testimony that when he said, "It's not fair." It is not in the case.

Seat the jury, please.

May I have the exhibit number, Mr. Bender?

MR. RYAN: P, your Honor.

(Jury present.)

THE COURT: I struck from the record Exhibit P.

I want you to disregard all testimony concerning the issue as to whether or not Mr. Hornberger's salary out of the corporation was fair. There is no contention here that it was unfair. Please disregard Mr. Gerimia's opinion that it was excessive.

All right, any further questions of this witness?

MR. RYAN: No questions.

MR. BENDER: No questions.

THE COURT: You are excused. You may leave.

Would you come up, Mr. Valardi.

(Continued on next page.)

ANDREW VILARDI, called as a witness, having been previously sworn by the Clerk of the Court, resumed the stand and testified further as follows:

CROSS-EXAMINATION

BY MR. BENDER:

Q Mr. Vilardi, I hand you back three of your folders from which you testified and which are marked Story Book Manor. Dotal and Horn, the schedules which you have marked or testified about which have been marked for identification.

Are those the schedules which were used to prepare the total amount of allege omitted income for each of the corporate years charged in the indictment?

A The schedules were used in conjunction with the preparation of the omitted income. However, the purpose of the schedules per se were to specifically identify those job numbers and related home buyers with each particular corporation.

THE COURT: Mr. Bender, if you want a yes or no answer, you say so, and I will direct the witness to answer yes or no.

On cross-examination, a lwyer has a right to insist on a yes or no answer. The witness cannot

at all times answer yes or no so I permit him to say, "I cannot answer that question yes or no." But this isn't to give the cross-examiner any advantage. It is only to keep the examination orderly.

If a witness were allowed to answer in any fashion he chose, we'd have pure chaos here. I invite Mr. Bender to confine the witness to yes or no, if he wishes, if the answer says it can be answered that way.

If you can't, just say you can't answer it yes or no.

BY MR. BENDER:

Q Would you take 115F for Identification, which I believe you testified was a schedule which you had prepared relating to the Dotal Corporation for 1967.

Do you have that in front of you?

A I do.

Q That schedule lists under the category of the corporation for the year an number of buyers, does it not?

A That is correct.

Q Then it lists a price -- is that the price of the house that was sold to the buyer?

A That is according to the corporate records, yes.

Q And by the corporate records, you mean the price included next to this buyer's name or the job number or what?

A The corporate records showed the job number and the related amount.

Q Does it show that it was Dotal that sold that house to that buyer?

A Yes.

Q And I take it you looked at the corporate record when you made that schedule up?

A Yes.

Q Now, did you also make a check at the county clerk's office in connection with the purchases relating to these very buyers?

A No.

Q Did Mr. Mazzella do so?

A I do not know.

Q You did not have access to any information which would indicate whether or not Mr. Mazzella did or did not go into the county clerk's office at Suffolk County to check to whom the houses were sold?

A I do not know what Mr. Mazzella did at that time.

Q To answer my question, you do not know of any

such record; is that correct?

A I am only ware of the rules about savings bank statements that I used --

Q Please, I am not asking you about that. I am asking you -- you worked with Mr. Mazzella after Mr. Gerimia resigned; is that right?

A That's correct.

Q You worked with him from when to when?

A I worked with Mr. Mazzella from ealy 1973, I believe, or late '72. My memory fails me to the exact date, through June of '73.

Q You prepared what we call a Revenue agent's report based upon your examination and you findings?

A That's correct.

Q Now, did the Roosevelt records show these buyers which you have listed on that schedule which I am now referring, 115F?

A To the best of my recollection at this time, I believe they did.

Q And did they indicate who the corporation was that made the sale?

A To the best of my recollection again at this time, I believe they did.

MR. BENDER: May we mark this for identification?

THE CLERK: One-page document marked Defendant's Exhibit _ for identification.

(So marked.)

(Continued on next page.)

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CROSS-E XAMINATION

BY MR. BENDER: (Cont.)

Q I show you Q for identification, which was a record given to me by the Government, pretrial. Did you ever see that record before?

A I never saw this record before.

Your Honor, might I qualify --

THE COURT: NO, no, the answer is you never saw this record before.

Next question.

Q From the time that you came in and took Mr. Gerimia's place, you worked closely with -- withdrawn.

From the time you took over the audit from Mr. Gerimia --

A That is not correct.

Q All right, from the time that you came to work on the audit; is that correct?

A That is correct.

Q You worked with Special Agent Mazzella, did you not?

A That is correct.

Q You worked on a join investigation did you not?

A That is correct.

Q And you submitted your final report to him,

did you not?

A I submitted my final report to the audit division not Mr. Mazzella.

Q Did you confer with Mr. Mazzella at all with respect to your schedules that you have in front of you?

A I did.

Q And did Mr. Mazzella ever tell you that he had checked these buyers which you have on 115F at the County Clerk's Office?

A I do not recall at this time.

Q You do not recall?

A That is correct.

Q Do you have any reason to believe during the time that you were auditing these corporations that the corporation that you have listed as having sold those houses to those buyers were not sold by Dotal but sold by Horn Enterprises?

A At the time I was doing the audit I had no reason to believe this.

Q And you have no reason to believe it since the audit?

MR. RYAN: Objection.

THE COURT: May I have the question?

(Record read.)

THE COURT: Overruled, I will allow it.

A I am sorry, can you repeat the question?

THE COURT: Since the audit, have you reason to believe that these houses were sold by someone else other than Dotal?

THE WITNESS: Since the audit -- can I --

THE COURT: To the present time.

THE WITNESS: Fine.

I believe there may have been some discrepancies up until the present time.

Q Let's look at the schedule you have of the house which you listed as having been sold by Dotal in 1967 to A. and M. George. Job NO. 4. Is that one of the houses that was mistakenly listed as having been sold by Dotal when actually it was sold by Horn Enterprises?

A Yes.

Q Let's take the next one. How about H. ARmod and J. and S. Sacher, Job 30. Is that also one that was sold by Horn Enterprises and not by Dotal?

A As far as I am aware, but at the time I was doing the audit it was sold by Dotal.

Q I am asking you whether since you did the audit -- as his Honor put it, up until the present time -- have you now come to a different conclusion?

A Yes.

Q You have come to the conclusion that the Sacher house was not sold to Sacher by Dotal but by Horn Enterprises; is that correct?

A I do not feel I could properly answer this question --

THE COURT: That's the answer.

MR. RYAN: Don't answer.

THE COURT: The jury may be excused.

(continued next page.)

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(The following occured in the absence of the jury.)

THE COURT: I think you ought to explain to the witness what you mean by "sold," Mr. Bender. Do you mean conveyance of title?

MR. BENDER: Conveyed title.

THE COURT: Only? In other words, you are not interested in that question in knowing who entered into the contract or who received the monies?

You are just talking about conveyance of title?

MR. BENDER: Talking about the purchase price, which was paid to the corporation for the house that was built, and which was listed in our books from which we reported the income on the return.

THE COURT: You may be talking about two different things. I do not know.

MR. BENDER: I'll take whatever suggestion --

THE COURT: No. I do not know whether the witness is puzzled.

"Sold" by means of conveyance of title? Sold by -- might try to identify the one who entered into the contract, who might not always be the one who has title, and sold might mean the individual corporation who received the contract price. Are they all the same? Is that what you mean by "sold"?

MR. BENDER: No. We are talking about -- what I am interested in is the actual conveyance of title.

The Government gave me this schedule. What the Government did was they went to the Suffolk County Clerk's office. They got the public documents. They examined the deeds. They examined who sold what, and that's what I am asking him.

THE COURT: You're asking him --

MR. RYAN: Him?

THE COURT: This witness --

MR. RYAN: What Mazzella did.

THE COURT: Whether he has examined the deed and whether he knows that Horn Enterprises conveyed title?

MR. BENDER: No, I'm not. I am asking him if he knows.

THE COURT: Now, "knows," means whether he ever examined the title; is that right?

MR.BENDER: No. If he knows that there was a search of the public records, to determine who actually conveyed title, so that they could know what corporation was required to report the proper income.

MR. RYAN: Your Honor --

MR. BENDER: That's for extras as well.

THE COURT: Well, I am sure there is more to it than this and I think the individuals who know ought to testify, and again this is an area that the parties ought to be able to agree on.

MR. BENDER: This man is going -- testifying to Schedules on the basis of which Mr. Ryan wants to claim that all of this income --

MR. RYAN: Just a moment.

THE COURT: Mr. Bender, it is too early for that, because I can see an argument being made on the conveyance of title. We are talking about income. We are talking about transactions, money.

MR. BENDER: That's right.

MR. RYAN: That's right.

MR. BENDER: That's what we're talking about.

THE COURT: Are you? That is what I am asking.

MR. BENDER: We are, Judge. The Government is charging -- I am only interested in the omitted income, what the Government is claiming.

THE COURT: But you ask who sold the property. Are you asking only who conveyed title? Does the party who conveyed title always receive the money?

MR. BENDER: It's certainly a good inference,

that if the corporation is not Dotal that's --

THE COURT: You are just playing with me. Look, you know the corporate set-up. I might ask you, at this point, in the light of what I anticipate your argument to be, are you claiming surprise at any point during this trial or are you going on the theory that the Government's allocation of --

MR. BENDER: Wrong.

THE COURT: -- extras is wrong?

MR. BENDER: Yes.

THE COURT: You knew about this and you don't want a continuance of any kind to prepare for any element of surprise in the Government's theory?

MR. BENDER: No, Judge.

I am cross-examining to show that there is no deficiency in income in -- as alleged in the indictment with respect to certain corporate income.

THE COURT: All right. You may continue.

If Mr. Bender asks questions about, do you know who conveyed title, and you do not know, then the answer is no. I do not want an explanation or anything else.

MR. RYAN: The appropriate witness for this examination is Agent Mazzella, who did all of these

things.

THE COURT: Now, look, if you have searched the titles and you are convinced that certain corporations conveyed title, why can't you stipulate with the defendant that job number so and so was conveyed by this and this corporation and that and that corporation? If it's documentary proof, why do we have to have witnesses testify ad nauseum on title questions? On conveyances?

I do not think you are listening to a thing I said, Mr. Bender.

MR. BENDER: I did.

THE COURT: Maybe you ought to repeat it and maybe we could get a stipulation. It's ridiculous, asking a revenue agent whether he knows whether Dotal or Horn Enterprise conveyed title. This man examined the books.

MR. BENDER: He also examined the Roosevelt Savings Bank records.

THE COURT: That's right.

MR. BENDER: Wouldn't that show who was -- with whom the deal was made?

THE COURT: No. May I suggest --

MR. BENDER: For the purchase of the house.

THE COURT: May I suggest a much better way, a more reliable way? If the Government searched the title --

MR. BENDER: They did.

THE COURT: -- and knows that Horn Enterprise conveyed job number so and so to Mr. X, why don't you just stipulate to that without any indication --

MR. BENDER: That's what it says. That's what this document is, which the Government gave me. That's -- but this gentleman here said he never --

THE COURT: Why do you insist on examining?

MR. BENDER: Because I want to show that the schedules that he has prepared are incorrect.

THE COURT: All right. Good luck to you, Mr. Bender.

You'd rather ask the witness questions about subjects he knows nothing about than accept the stipulation of the Government as to who conveyed title.

MR. BENDER: I am very happy to accept the stipulation.

THE COURT: Are you ready to stipulate, Mr. Ryan? Are you ready to stipulate on the corporations that conveyed specific titles to specific individuals?

MR. RYAN: What the record showed, yes.

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THE COURT: What the record shows.

MR. RYAN: Of course.

MR. BENDER: Will the Government also stipulate that this gentleman allocated the extras which have been charged as having been specifically omitted from the corporations, was likewise allocated based upon the conveyance of title?

MR. RYAN: No.

THE COURT: Look, now you are trying to confuse issues. That may be one of the jobs of the defendant's counsel.

MR. BENDER: I am not, Judge.

THE COURT: I am trying to keep them separate. We are trying to stipulate matters of record. There is no reason I can think of that -- you won't stipulate that the record says so and so.

Now, you want to tie that in with allocation of income. There might be an explanation for the Government allocating income to Dotal, in spite of the fact that title was conveyed by Horn.

Now, I don't know --

MR. RYAN: We do.

THE COURT: -- why you refuse to accept the stipulation as to matters of record.

MR. BENDER: I have -- I will be glad to accept it.

THE COURT: I say, I can't understand that. I do not see how it weakens your case.

MR. BENDER: I think it also applies to-- I'm sorry. I think it also applies to the credibility of the witness.

THE COURT: All right. Please bring in the jury. I can see it is easier just going into a lot of matters that really can be stipulated to.

MR. BENDER: Judge, one thing he's got nothing to do. I can stipulate on this and strictly ask him questions about allocation.

THE COURT: I will not ask you to do anything. If you want to do it, go to Mr. Ryan and make your stipulation.

Seat the jury.

But knowing is two things. Knowing is seeing or hearing or hearing about. If you don't know, say you don't know.

Seat the jury, please.

(Jury present.)

THE COURT: You may continue, Mr. Bender.

(Continued on next page.)

BY MR. BENDER:

Q Mr. Valardi, with respect to the extras that the Government charges has been omitted from Dotal Corporation, did you make the allocation of the amount of those extras?

A No.

(Continued on next page.)

Q Who made that allocation?

A I believe it was Special Agent Mazzella.

Q Did he use your schedule that you have there?

A In some instances, yes.

Q Now, based upon what you had told us, with respect to at least George and Satchell, to the extent that extras have been allocated to Dotal from those buyers, do you claim now -- I mean, do you agree now that they should have been allocated to Horn?

A I do not know.

Q You do not know?

A That is correct.

Q And would your answer be the same if I asked you with respect to any of the other schedules that have been identified by you? 115-D on Horn Enterprises, for 1967? 115-E, Horn Enterprises, 1968? 115-G, Dotal, 1968? And 115-H and I for Manor, 1967 and 1968?

A I can only answer that question if I can review those related schedules.

Q They are right in front of you.

A If I may take the time?

THE COURT: Surely.

Q Yes.

THE COURT: Suppose we take a luncheon recess

and I will ask you to get back at 1:45, and that will give the witness an opportunity to review the schedules.

Will you be back after lunch, Mr. Rudolph, to repeat the question?

All right. 1:45.

(Luncheon recess taken.)

AFTERNOON SESSION

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THE COURT: Apparently two jurors are missing.

MR. BENDER: I didn't have a chance to examine Mr. Gerimia's schedule during lunch.

In my inadvertence, they were removed from the Courtroom so I haven't looked at them.

THE COURT: I thought this was all made available to you before the trial?

MR. BENDER: That whole big box was made available, but there was so much to go over.

This is probably my fault. I should have told Mr. Ryan. I don't think I will take too long, your Honor.

MR. RYAN: I would like to mark the application for reward.

THE COURT: Incidentally, all the 3500 material has been marked, hasn't it?

MR. RYAN: I do not think I marked all of Canale's statements that I gave to Mr. Bender.

THE COURT: I think it is very important. The Clerk pointed out that he did not think the schedule that Mr. Bender used -- the schedule of homes --

MR. BENDER: That wasn't 3500, your Honor. It was a discovery and inspection which we worked out prior to the trial.

MR. RYAN: Schedules that we gave him.

THE COURT: All that should be marked, discovery material or 3500.

MR. RYAN: I have those two letters of the material forwarded to Mr. Bender.

They are marked for identification as a record of the materials that we gave them copies of and I put on the record that he was able to examine the volumes of all the exhibits.

THE CLERK: Application for reward marked Government's Exhibit 140 for identification.

Letter dated June 27, 1974 marked Government's Exhibit 141 for identification.

MR. RYAN: I want to make a brief statement with respect to that.

I have been requesting and didn't receive until the lunch hour today the reward application from Benjamin Greshin.

It was necessary to get his written authorization. It is here and signed by Mr. Greshin and dated August 24, 1973.

I'd like to offer it into evidence.

MR. BENDER: I am only concerned about some of the form language in here.

For example, he applies for a reward in

accordance with law and regulations for original information furnished to the IRS of Brooklyn. That language is O.K., but then, "leading to the detection of a violation in the Internal Revenue laws of the United States by Elmer Hornberger."

I am a little concerned about that language. Other than that, I would have no objection to it going in. I think the Jury could get a misleading impression from that statement. It in effect suggests that there was a violation of the Internal Revenue laws, and that is one of the questions here.

THE COURT: Alleged violations?

MR. BENDER: Leading to detection of a violation.

MR. RYAN: Could a statement be given by the Court stating there is no evidence of anything, just the mere fact that Mr. Greshin signed the form for the reward.

You referred to this as an informer's agreement. I don't think that's an accurate description.

I think a statement could be made without putting a line through the document and perhaps causing speculation, that this is no evidence whatsoever of any wrongdoing on behalf of Mr. Hornberger.

MR. BENDER: The only thing I was thinking of is that you have in the record that he did make an

application for a reward.

MR. RYAN: Right.

MR. BENDER: If in some way you could just avoid the inference --

THE COURT: I do not see how it is relevant. I would sustain an objection to it. It cannot be used by the defendant to impeach the witness' testimony. If anything came out in the testimony that is erroneous, then this document could be introduced to correct the error or explain it.

Just mark it to show that you produced it.

MR. RYAN: All right.

THE COURT: If the defendant wants to introduce it, let him.

MR. BENDER: I don't think so.

MR. RYAN: On redirect, I would want the Jury to see it's an application and not a contract or a deal.

THE COURT: I am not going to characterize it.

MR. RYAN: There is a provision in the code for this procedure.

THE COURT: That is all right. If you want me to charge it, I will charge the statute.

MR. BENDER: There is no statutory provision indicating the procedure. There is a statutory

provision relating to the right of the IRS --

THE COURT: I will take a request to charge on it.

MR. RYAN: It is 7623, it authorizes the Secretary to award -- to make rewards for information relating to violations.

MR. BENDER: Up until 10 per cent, based upon--

MR. RYAN: It depends on your summation. If you don't raise it, I won't request it.

THE COURT: Everything else is in the rules. Can you start your examination, Mr. Bender?

MR. BENDER: Yes, I can.

THE COURT: Seat the Jury.

(Jury present.)

THE COURT: Good afternoon, we are ready to start.

A N D R E W V I L A R D I , called as a witness, having been previously duly sworn by the Clerk of the Court, resumed the stand and testified further as follows:

CROSS EXAMINATION

BY MR. BENDER (continued):

MR. BENDER: The defendant will be right here, your Honor. He is on the telephone.

(Pause.)

THE COURT: You may proceed.

Q Mr. Vilardi, with respect to the schedule 115F, which is Dotal for 1967, would you open that?

A Yes.

Q Did I understand you to say that you in listing the buyers with respect to the Dotal corporation examined the Roosevelt Bank records?

A That is correct.

Q And did your examination of the Roosevelt Bank records reflect -- in connection with the buyer George, for example -- that the owner of that property which was sold to that particular buyer was Dotal Building Corp.?

A I do not recall at this time.

Q I show you 15A --

MR. RYAN: I am going to register an objection, unless the questions are directed to this witness' worksheets. I have other witnesses to come forward with this subject matter. I am going to object to any questions beyond the worksheets which the witness was asked to identify.

THE COURT: I will listen to any objections at the time the question is made. I do not give any advisory opinion.

MR. RYAN: Very well.

Q Exhibit 15 in evidence, is the cancelled checks,

a letter from Horn Enterprises which is 15A, and a letter from Horn Enterprises requesting Mr. and Mrs. George to --

THE COURT: Is this in evidence?

MR. BENDER: Yes.

May I proceed, your Honor?

THE COURT: Yes.

Q -- (continuing) -- requesting Mr. George to indicate that the following list of extras have been ordered.

It does not have -- the bank statement -- but the contract which is in evidence indicates it's an agreement between Horn Enterprises and George, which is Government's Exhibit 15B.

I do have --

THE COURT: Is this the question, Mr. Bender?

MR. BENDER: No, I am going to mark for identification the bank statement because it is not a part of the record.

THE COURT: Go ahead.

MR. BENDER: May we have this marked for identification?

THE CLERK: Document marked Defendant's Exhibit R for identification.

Q Looking at R for identification, would you be able to tell from having examined the Roosevelt Bank records,

whether that is a record of the bank relating to the buyer, Mr. and Mrs. George?

A This is a record of the bank relating to the buyer --

Q Whose --

A Hold on.

OK, yes.

Q Who does the bank indicate the owner of that piece of property to be?

A The bank indicates that the owner of this particular piece of property is Horn Enterprises.

Q So to that extent -- that conflicts, does it not, with your listing of George under the Dotal Corporation, does it not?

A It does not.

Q In what respects does it not?

A It does not in the respect that this particular buyer, Anthony and Mary George, shown as job number four, were recorded on this particular Dotal worksheet because it was shown on the Dotal Corporation books as job number four.

Q Despite -- in other words, what you are telling us then that you really just examined the Dotal corporate books?

A I examined both the Dotal corporate books and

the Roosevelt Savings Bank's records.

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Q To the extent that the books you say reflect that Dotal was the owner of that piece of property which was sold to George -- or that house -- then that conflicts, does it not, with the bank record which is before you?

A The answer to that question is yes.

Q And isn't it also true that to the extent that any extras, which were allegated to this corporation as having been performed for Mr. and Mrs. George, was likewise requested on the stationery of Horn Enterprises?

A I do not know.

Q This is 15A in evidence --

A I do not know how these extras were allegated in this particular point in time.

Q You could look at 15A --

MR. RYAN: Objection.

THE COURT: Sustained. It is argumentative.

Q Now, it is a fact -- is it not -- that with respect to the extras that were allegated -- I believe you said Mr. Mazzella did that?

A That is correct.

Q He used your schedules which you have in front of you in order to determine what corporation to allegate them to?

A In most instances, not all.

Q To the extent that you have allegated a particular buyer to a particular corporation, which was incorrectly allegated to the corporation, so would the extras that Mr. Mazzella allegated to that same corporation be incorrect?

MR. RYAN: Objection.

THE COURT: Can you answer that?

I will overrule the objection if you can answer it.

THE WITNESS: I can answer that only in the context --

THE COURT: He cannot answer it yes or no.

MR. BENDER : Shall we permit him --

THE COURT: That is up to you.

JUROR NO. 6: Can I hear the question again? I didn't hear it.

MR. BENDER: Suppose I withdraw it.

THE COURT: Assume that the purchase was improperly attributed to Dotal --

THE WITNESS: Yes.

THE COURT: -- would it necessarily follow that the allegation of the income that represented extras would also be improperly allegated to Dotal?

THE WITNESS: Only if Mr. Mazzella used my

schedule for that particular purchase. If he did not, it may not have.

Q Do you know whether he did?

A I don't know.

Q You have no idea?

A I have no idea as far as what he did in allocating specific items.

Q Didn't you write a revenue agent's report where you asserted certain deficiencies?

A That's correct.

Q Didn't you assert deficiencies based upon alleged omitted extras of each corporation?

A That is correct.

Q Are you still telling us that you don't know whether or not Mr. Mazzella used your schedules to allegate the extras?

A I am saying to you, sir, that I do not know what particular method of allocation Mr. Mazzella used.

I merely used Mr. Mazzella's record as a substantiation of my record. His method of allegation, I do not know.

Q Do the extent that any extras were allegated as having been omitted from Dotal Corporation with respect to the purchase of George --

A I am sorry, I don't follow your question.

Q I haven't finished.

-- To the extent that extras that Mr. George had ordered, which allegedly have been omitted from the income of the corporation Dotal was incorrect, and those extras were ordered from Horn Enterprises -- that would affect the determination of how much was the proper income that the Government claims was omitted from Dotal, wouldn't it?

A If I understand your question -- if I could rephrase it in the way I understand it?

Are you saying if the books are wrong --

MR. RYAN: Objection.

THE COURT: Sustained.

THE WITNESS: I am trying.--

THE COURT: Your answer is you do not understand the question.

THE WITNESS: I don't.

Q Your schedules -- withdrawn. When you set up in your revenue agent's report alleged deficiences against Dotal Corporation for the year 1967, based upon omitted extras --

A Yes.

Q -- you referred to a list of purchases which you have on that schedule -- which is 115F for identification--

isn't that right?

A That is not correct, sir.

I referred to Mr. Mazzella's schedule which I used as substantiation for my workpaper, not this particular workpaper.

Q You mean the extras that Mr. Mazzella came up with?

A Correct.

Q But these extras you allegated to each of these purchases, did you?

A I merely took Mr. Mazzella's schedule and said that these items were omitted income. I made a recap schedule of my own and attached it to Mr. Mazzella's schedule.

Q And allocated that to the Dotal Corporation?

A Based on Mr. Mazzella's schedule alone.

Q You did not refer to these schedules which you identified at all?

A As far as allegated extras to the corporation, the answer to that question is no.

Q As far as determining any alleged omission of income from the Dotal Corporation in 1967 --

A Again the answer is no, I merely used Mr. Mazzella's schedule.

Q One final question.

Are you telling the Court and jury that the alleged omitted income relating to the extras --

A Yes.

Q -- were figures allegated to the corporation solely by Mr. Mazzella?

A That is correct.

Q And those are the figures which the defendant is charged with in the indictment?

A That is correct.

MR. BENDER: I have no further questions.

MR. RYAN: No questions.

THE COURT: Call your next witness.

MR. RYAN: Mr. Mazzella, please.

G E O R G E M A Z Z E L L A, having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK; State your full name.

THE WITNESS: George Mazzella, M-a-z-z-e-l-l-a.

DIRECT EXAMINATION BY

MR. RYAN:

Q Mr. Mazzella, you are a special agent in charge of the investigation of this case?

A Yes.

Q And you are familiar, are you not, with

exhibits 14 through 107 dealing with payments for extras in this case?

A Yes, I am.

Q During the course of your investigation, did you undertake to trace the payment of these extras?

A Yes, I did.

Q Can you tell us where the payments for extras went?

A They were deposited into the personal bank accounts of Mr. Hornberger.

MR. BENDER: That is objected to, your Honor. This is not a net worth case -- a reconstructing income case.

THE COURT: Is that the ground?

MR. BENDER: It is not binding upon the defendant -- no proper foundation laid.

THE COURT: Oh.

MR. BENDER: I knew I would get the right objection.

THE COURT: One out of three isn't bad. Objection sustained on the last count. First establish a basis.

Q I show you Government's Exhibits 114, 113 and 112 which are in evidence.

Will you tell us what 112 is?

A 112 is an analysis of Mr. Hornberger's bank account at the Bank of Smithtown for the year 1967.

Q What's attached to that schedule?

A A copy of the signature card and statements of account.

THE COURT: By statement of account, you mean deposits and withdrawals?

THE WITNESS: Yes.

Q Which bank was that?

A Bank of Smithtown.

Q Tell us what 113 is, please.

A 113 is a schedule of analysis of the personal bank account of Mr. Hornberger at the Eastern National Bank for the years '67 and '68.

Q What is attached to the schedule?

A Copies of the account statements.

Q Okay.

Will you tell us what Exhibit 114 is?

THE COURT: These are exhibits marked in evidence?

MR. RYAN: The exhibits are the schedules.

Q Tell us what 114 is, not 114A.

A 114 consists of copies of the bank account of

Mr. Hornberger at the Tinker National Bank. There are the statements and copies of the signature card.

Q Did you prepare a schedule in connection with that account?

A Yes, I did.

Q You had it marked 114A?

A Correct.

MR. BENDER: I think at this point with respect to these records, I did reserve a right to strike them earlier, though not with respect to competency.

THE COURT: You mean genuineness of the records?

MR. BENDER: No.

THE COURT: Do you concede it is a document made in the regular course of business?

MR. BENDER: Yes.

The only trouble is that it is so unclear and the entries on them are so hard to decipher, it almost makes it difficult to be read as an accurate and true record.

THE COURT: You say it is a bad copy?

MR. BENDER: Extremely bad.

THE COURT: May I see it?

(Document shown to Court.)

I find that it is relatively true of 112A --

MR. BENDER: You mean 112, your Honor?

THE COURT: It is attached to 112A.

MR. BENDER: I think 112A is a schedule.

THE COURT: 112, yes.

My aging eyes have a little difficulty in deciphering it. I wouldn't say that it is illegible. I think a little attention to any specific item brings out the figure quite clearly. The others I find no trouble with.

BY MR. RYAN:

Q Now, Mr. Mazzella, you told us that you undertook to trace the payment of the extras, correct?

A That is correct.

Q Would you tell us how you undertook to do that?

A I interviewed homeowners -- various homeowners, along with other special agents, and through the information obtained --

MR. BENDER: That is objected to.

THE COURT: Strike out "through the information obtained."

Q What records did you use in your attempt to trace the monies?

A I examined the microfilm of the various banks involved.

Q In the exhibit before you?

A Correct.

Q Are those the documents that you examined?

A I located checks --

Q From the bank's --

A From the bank's microfilm.

Q And you are aware, are you not, of the checks and other information shown in Exhibits 14 to 107 showing the 92 transactions?

A Yes.

(continued next page)

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Q Did you do anything with these records in an attempt to trace these monies?

A I traced them --

Q Yes or no?

A Yes, I did.

Q What did you do with the records?

A Wait. Would you repeat the prior part?

Q What did you do with the records you had of the payments for extras in attempting to trace these monies?

A I traced them into the -- as deposits into the personal bank accounts.

Q All right. For what years?

A '67 and '68.

Q All right. Did you then undertake to trace the flow of money any further?

A Yes, I did.

Q What was the next step you undertook to further trace the money?

A I traced a substantial amount of funds that were deposited into these accounts into the various corporations of Mr. Hornberger.

Q When you say that you traced a substantial amount of funds deposited into the personal bank account of Mr. Hornberger, what funds are you referring to?

A Funds on the extras.

Q All right. How did you trace the flow of money from the personal bank accounts to the various corporations? How did you do that?

A I obtained photocopies of the checks that were drawn against the personal accounts and they were deposited into the corporate accounts involved.

Q All right. Are the checks drawn on the personal accounts part of the Exhibits before you?

A Yes, they are.

Q Did you add up the amount of monies drawn from the personal bank accounts by Mr. Hornberger into each corporate account?

A Yes, I did.

Q Did you make any summary of those amounts?

A Yes, I did.

Q May I have those, 112, 113 and 114?

A Yes.

Q I hand you 108, 109, 110, 111, which are marked in evidence except for schedules attached thereto, which are marked for identification. Would you look at those, please?

Now, can you tell us what the exhibits are, not the schedules?

A The exhibits consist of photocopies of the

deposit tickets of the various corporations involved and also of various checks drawn on the personal bank accounts of Mr. Hornberger.

THE COURT: Are they all the deposit tickets of the particular corporation for each year?

THE WITNESS: No. Just the ones that relate to the extras involved -- I'm sorry -- the stockholder advances.

THE COURT: You do not have the deposit stubs that represent the purchase price or building loan advances?

THE WITNESS: No, I don't, your Honor.

THE COURT: All right.

BY MR. RYAN:

Q Do you have the deposit receipts referred to by Mrs. Coletti that were in the check stub book?

A We have some of them, yes.

Q Some deposit receipts; is that right?

A That is correct.

Q Do you have any deposit slips?

A Yes, we do.

Q Based on those records, are you able to tell us how much money was transferred by Mr. Hornberger's checks from his personal accounts to each corporation for each year?

A Yes, I can.

Q Will you tell us how much money was transferred in this form to the Dotal Corporation for the year 1967?

A Nothing was transferred.

Q How about for the year 1968?

A Fifteen thousand dollars.

Q Was that in one lump sum or in separate sums?

A It consists of three payments, three checks.

Q What are the amounts of each payment?

A Two thousand dollars, one thousand dollars, twelve thousand dollars.

Q All right. Would you now direct your attention to your analysis concerning the Horn Enterprises Corporation? Do you have it before you?

A Yes, I do.

Q Are you able to tell us how much Mr. Hornberger advanced from his personal bank account into the Horn Corporation for the year 1967, the total?

A Eighteen thousand, three hundred dollars.

Q In what amounts?

A One thousand dollars, five thousand dollars, eighteen hundred dollars, four thousand, twenty-five hundred, two thousand, two thousand.

Q Can you tell us how much was transferred to the

Horn Corporation for the year 1968?

A Three thousand dollars.

Q Would you direct your attention to the Story Book Manor Corporation? Are you able to tell us how much money was transferred from Mr. Hornberger's personal account to the Manor Corporation?

A Yes.

Q For the year '67?

A Yes, I can.

Q What is the total?

A Three thousand, seven hundred, twenty-five dollars.

Q What did it consist of?

A Five hundred dollars, two hundred twenty-five dollars, one hundred dollars, one hundred dollars, five hundred dollars, fifteen hundred dollars, eight hundred dollars.

Q How about for the year 1968, can you tell us the funds transferred to the Manor Corporation?

A Yes, I can.

Q How much?

A Fifty-seven thousand, seven hundred, sixty dollars.

Q What did that consist of?

A Twenty-five hundred dollars, fifty-nine hundred

fifty dollars, sixteen thousand, fifteen thousand, ten thousand, seven thousand, thirteen hundred ten dollars.

Q All right. That's for what year, '68?

A '68.

Q All right. Now will you turn your -- direct your attention to the Story Book Homes Corporation and tell us how much was transferred from the personal Hornberger accounts to the Homes corporate account?

A In 1967, thirty-eight hundred dollars was transferred.

In 1968, sixty-one thousand three hundred dollars.

Q In what amounts were the transfers?

A In 1967, there was one check for thirty-eight hundred dollars.

In 1968, there is ten thousand, one thousand, fourteen thousand, six thousand, seven thousand, four thousand, seven thousand, five thousand, five thousand, twenty-three hundred.

Q All right. Have I covered the four corporations?

A Yes, you have.

Q All right. What does the total amount of advances add up to, to all the corporations during these two years?

A One hundred sixty-two thousand, eight hundred eighty-five dollars.

Q During your investigation, did you have occasion to discuss this matter with Mr. Hornberger?

A Yes, I did.

Q When?

A On September 14, 1972.

Q Where?

A The office of his accountant, Mr. Canale.

Q Who was present?

A Mr. Hornberger, Mr. Canale, Revenue Agent James Wexstet (phonetic) and myself.

Q What was the initial conversation as you arrived at that meeting?

A We had discussed the various deposits to the stockholder advance accounts of the various corporations.

MR. BENDER: Excuse me, your Honor. I object to the words "we discussed."

I'd like to know who said what and who --

THE COURT: Try to identify the speaker and give the substance of each conversation.

Q First of all, you are looking at some document before you. What is it?

A It is a memorandum of the interview that I had

made for that day.

Q That's been marked. Is that the same one that's been marked?

A I believe so.

Q Referred to before? OK.

MR. BENDER: It's Exhibit N for identification.

MR. RYAN: Thank you, Mr. Bender.

Q Now, without looking at the document -- please put it down -- will you tell us your best recollection of what was discussed at this meeting concerning advances?

A I had questioned Mr. Hornberger with respect to the various advances to these corporate accounts. We had the corporate books available to us. We went over them item by item.

I asked Mr. Hornberger at each item the source of these funds. And together with Mr. Canale, they were identified as loans to the corporations.

Q Well, who made the identification and what was said in that regard and who said it?

A Mr. Hornberger identified the payments -- the advances as loans.

Q And was there anything else discussed about it?

A Yes. I asked him the source of the funds. He said he had gotten them -- had gotten loans from his mother.

Q Was there any further discussion about that?

A I asked him to identify it further and -- may I look at my memorandum for the details?

Q Do you need it to refresh your recollection?

A On some instances, perhaps.

Q Well, tell us without looking at it first what your best recollection is?

A Well, I asked him where -- where did your mother get this money. He said that she had gotten it from his -- from his father, before he passed away.

I asked him, "Where did your father get this money?" and he said that he had gotten it from his grandfather, who was a banker many years ago and had died approximately twenty years ago.

I asked him, "Where was this money kept?" He was not sure where it was kept. He did not know.

I said, "How did you get it? Was it in cash?" He said, "Yes, in cash. I believe it was cash."

I asked him the denominations on that. He could not recall the denominations.

Q Is there anything else you can recall that was discussed about this particular subject?

A Not at this moment, I don't recall, without --

Q All right. Take a look at your report and then

tell me whether there is anything additional?

A I had asked him, "What did your father do for a living?" And he had explained to me that he had worked for the Government for about twenty-five years.

I asked him that at the death of his father, was there a will filed or was there any estate tax returns filed. He said -- he said, "No."

I asked him if he knew where this cash was kept hidden. He said, "No."

Q All right.

A That's all that relates to that matter.

Q OK. Now I'd like to go on to another subject matter.

Did you during the course of your investigation attempt to make an allocation of extras to each corporation; yes or no?

A Yes, I did.

Q Would you tell us whether you obtained any records for this project?

A Yes, I did.

Q What records?

A I obtained copies of the Roosevelt Savings Bank's statements. They were the -- the bank which furnished the money to build these homes.

Mazzella-direct

MR. BENDER: I make the same objection I made before.

THE COURT: The Jury may be excused.

(The following occurred in the absence of the Jury.)

THE COURT: Do you have the bank statements, Mr. Bender?

MR. BENDER: No, your Honor.

THE COURT: What bank statement did you turn over to Mr. Vilardi when he was examined?

MR. BENDER: I just -- we have -- some of the Government's exhibits have bank statements, which have been admitted in evidence, and we have our -- Mr. Wolfsont's own.

THE COURT: Are you bringing all the bank statements of the 92 houses, Mr. Ryan?

MR. RYAN: I have them here. Do we have a statement for every --

THE WITNESS: Not every one because --

MR. RYAN: How many?

THE WITNESS: A good portion of them. Most of them. Others did not use the bank as --

MR. RYAN: They used a different bank?

THE WITNESS: They had proceeds of money from

elsewhere.

MR. RYAN: All right. We have them in these exhibit folders and, I must say, Mr. Bender, I think if you will check, you have every one of them that we have.

MR. BENDER: We have some of them.

MR. RYAN: You have every one that we're relying on.

THE COURT: Do you question the genuineness of any one of those that you have?

MR. BENDER: I don't question the genuineness of a bank record, your Honor.

I don't think I've made myself clear. I just took my objection because I think it's improper for an agent to testify that he went to some third place, whether it's a bank or it's a restaurant, with whom the defendant may have done business and said, "I examined that third party record, I got a copy and this is what it says."

I just say there is not a proper foundation for that.

Now, I don't question the accuracy of the bank records at all.

THE COURT: What you are saying is that this

witness' version of what the bank records are is hearsay? Is that what you are saying?

MR. BENDER: Not only that, but he's not the proper party to be able to authenticate a bank record, which was prepared and made by somebody else.

THE COURT: But do you agree that if he expresses an opinion and if the opinion is based on matters that are in evidence, that the opinion may be expressed, based on the records?

MR. BENDER: I do.

THE COURT: Bring the records in then. All the records and introduce them all, will you please?

MR. RYAN: Yes. I'll have to get the --

THE COURT: Now, seat the Jury.

All that has to be given to the opposing party is the basis upon which the opinion is expressed.

MR. RYAN: That's right, that's right.

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THE COURT: There are two different theories that I believe counsel is confused with. One, that a witness cannot testify as to what a record means that is not in evidence. It's the record which in itself is hearsay, which may be introduced if it's a business record.

The other is the expression of an opinion by an expert, and I assume when you are asking for allocation, you are qualifying this witness as an expert, right?

MR. RYAN: For the basis of the allocation.

THE COURT: On the allocation.

MR. RYAN: Right.

THE COURT: And he must show the basis upon which he expresses his opinion.

Right?

MR. RYAN: right.

MR. BENDER: Has he been qualified as an expert?

THE COURT: I assume that that will be done. If you question it, you may do it. But suppose you do that before the jury.

MR. BENDER: I have no dispute with Mr. Mazzella's qualifications as a special agent and investigator, and I think he's of the best. But

whether he's qualified now as an expert on the provisions of the Internal Revenue Code, I don't know.

THE COURT: I thought he was expressing an opinion as to where these extras or the proceeds of the extras were to be deposited, in which corporate account. That's what's meant by allocation. Right?

MR. RYAN: That's right. That's the basis of the government's charge.

THE COURT: It may very well be that even without the expert opinion, the government could argue that from the records this is obviously where it should go. But sometimes we're not sure as to when an expert opinion is required.

I will allow him to be qualified and express an opinion as an expert.

MR. RYAN: How would you like -- the bank statements I have here. I can pull them out from each folder and make one batch.

THE COURT: If you have all 92, then do it thatway. If you haven't, bring the bank in and let them introduce the file and show all the records and show that the various corporations got the money.

MR. RYAN: We're starting to pull out the bank statements.

THE COURT: Have you got 92?

MR. RYAN: We have every one that the agents got. They don't add up to 92 because not all the loans went from these particular banks.

THE COURT: Some bank made a loan?

MR. RYAN: Sure. Sometimes it was the Dime Savings, but in very few of the instances.

THE COURT: Pick out all the Roosevelt Savings.

MR. BENDER: Can we ask a question?

THE COURT: Sure.

MR. BENDER: Maybe we're -- let's ask Mr. Mazzella to what extent and for what purpose he's relying on the bank records. Then we can see whether this is all -- I mean, to make the allocationand we will see whether it's all necessary.

THE COURT: I do not see what it has -- what it has to do with the case, but you are the one that has been making the point of it. Obviously a purchaser signed a mortgage, converted the building loan into a permanent mortgage. I've done this 500 or 1,000 times myself.

MR. BENDER: That's correct.

MR. BENDER: That's correct.

THE COURT: It's so routine, it's as routine as smoking a cigarette. You're the one that makes the point, as to whether a certain bank gave the building loan money to a certain corporation. Aren't you?

MR. BENDER: Of course.

THE COURT: That's the only point.

All right.

MR. BENDER: All I'm saying is this, Judge. Mr. Mazzella is saying that in answer to Mr. Ryan's question, he made an allocation of the extras charged to have been omitted to these various corporations, based upon certain records, and one of the records are the bank records, meaning the Roosevelt Bank records. Now I'm saying --

THE COURT: Well, I do not know what you mean by that, but that's cross-examination.

MR. BENDER: I'm saying, maybe if he explains to you and to us to what extent he used the bank records, we may have no objection.

THE COURT: No. Do that before the jury.

I understand that the bank gave no money on extras and I do not see what that has to do with the extras.

MR. BENDER: Then why did he put it in?

THE COURT: I say, that's cross-examination. You are making a point of it.

MR. BENDER: I have to make an objection only at a time when the man says he examined some record at some place of a third party.

You want to take it subject to connection and let me -- take it subject to connection.

THE COURT: Cross-examine, but all I say is, thatsince you made the objection, you made the objection when Mr. Valardi testified, that he had no right to look at the bank record, even though you now say it doesn't matter because we're talking about extras which weren't the subject of bank financing, nevertheless, it's error to ask the witness whether he saw the bank records.

MR. BENDER: No. It's error for the witness to testify that the documents that are being introduced or marked for identification are based upon his inspection and review of bank records at the bank.

THE COURT: All right.

MR. BENDER: That's all.

THE COURT: So the way we will do it is we will bring the bank records in. We will have

Mr. Valardi go back on the stand and the government will say "Are these the bank records you examined?"

MR. BENDER: But you overruled me, and I was content.

THE COURT: No, no. We will bring the records in.

MR. BENDER: But Judge, if -- it appears we -- we don't have to waste all this time if it appears, as you say, and as I think that whether he did review the bank records or not, except possibly, except possibly to the correct corporation to whom the omitted extras should belong, except to that extent it may not -- it may not be necessary.

THE COURT: Listen, I know, Mr. Bender, you are trying very hard to bring in what I consider irrelevant matter and you may be successful before the jury.

MR. BENDER: I don't want to.

THE COURT: If you keep saying --

MR. BENDER: I don't want to. It may be due to my ignorance about real estate matters.

THE COURT: You keep saying you are talking about the money going to the or the extras going to the party to whom the records at the bank show own

the property.

Mind y ou, the testimony so far is that the government got all this information from your records, your defendants' records, from Dotal, in particular.

Now, you are saying that Dotal was wrong. I don't know whether you are arguing that the fraud wasn't as the government claims.

MR. BENDER: I am not saying Dotal.

THE COURT: But the fraud, rather, was that they did not own the properties, that Horn really owned the properties but Dotal got the money.

MR. BENDER: I'm not saying that.

THE COURT: That seems to be the argument.

The point is, the government is saying$150,000 was made in extras. It was never reported as income. That's the simple matter.

MR. BENDER: They're not saying that, Judge. They're saying in 8,-- in 6 counts that $156,000 in extras were omitted from -- as follows. Count 3, Count 4, one corporation. Count 5, Count 6, another corporation. Counts 7 and 8, another; and 8 and 9, another.

Now, this is important for them to prove.

I don't disagree with you.

THE COURT: I read that.

MR. BENDER: We've conceded that we got extras totalling --

THE COURT: But Counts 1 and 2 also say that there was unreported income in the personal returns.

MR. BENDER: That's right. Depending upon --

THE COURT: Above.

MR. BENDER: -- the constructive dividends from these corporations.

THE COURT: You are talking about constructive dividends. I do not know whether that is the only theory the government has to rely on.

MR. BENDER: But they said so. We had it in the pretrial.

THE COURT: Do we have the transcript of the pretrial conference?

MR. RYAN: It has not yet been transcribed.

THE COURT: I would like to see that.

MR. BENDER: Absolutely.

THE COURT: I do not know how firmly that binds the defendant. It's a bill of particulars. If they ask to amend the bill of particulars, I will listen very sympathetically to that application.

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MR. BENDER: I do not know what you mean. The government is charging -- it's in the agents' report - - the income omitted they say is based upon a constructive dividend, which Mr. Hornberger received as a result of the omitted extras which the corporations should report.

THE COURT: You think that's the only theory? By constructive dividend they will consider it as if it first went to the corporation and he received it as a dividend from the corporation?

MR. BENDER: That's the theory.

THE COURT: How about the theory he personally took the extras in the first instance and deposited it to his account as income and never reported --

MR. BENDER: What kind of income, salaries, additional salaries, additional compensation? What is it?

Is it a return of capital?

The government says it's a constructive dividend that he diverted from the corporations.

THE COURT: I am not going to listen to any more argument.

MR. RYAN: May I make a statement as to the witness' testimony?

It might facilitate the examination, if your Honor is aware and Mr. Bender is aware of what I propose now to adduce from this witness.

It is simply this: This witness examined all the documentation that he was able to get about a particular sale, that included the deed, the corporate records as reflected in the work papers, including closing statements, correspondence and sometimes contracts of sale.

He took this documentation and he made a determination that this particular job was done by Dotal Corporation for example. It was reported in the Dotal books and even though the deed said title passed from Horn to the buyer, the government alleges through this witness' testimony that this extra is allocated to Dotal Corporation and this is how he made the allocation. It's as simple as that.

THE COURT: Let me tell you what I find wrong with the form of your questions.

You asked thiswitness whether he made examinations and investigations and what he learned. That to me is improper. If you ask a witness to express an opinion -- and I assume that is what this witness is on the witness stand for -- you

point to matters in the record in this trial and say: "I show you this record, I show you this record, I show you this record. Do you have an opinion as to where the proceeds of the extras went?"

That's an opinion.

MR. RYAN: I will do that.

THE COURT: It is based upon the fact that there is a contract or based on the fact that the books of the corporation show the sale to be made by and that various building loans and building loan payments and possibly the purchase price was paid to the corporation. Based on that, it is a fair inference that this corporation was due the extras.

It may be on the fact that that corporation paid for the cost of the extras. I don't know.

Instead of asking whether he looked at documents and what they meant to him, the proper question is:

"Assuming these facts that are in the record, can you express an opinion as to which corporation was entitled to the proceeds of the extras?"

That might eliminate a lot of problems.

We are not interested in whether he made an investigation and whether he went to the bank and looked at the films. This is apparently what the objection is about. He is testifying to his investigation of what records are. The records themselves would be admissible into evidence, but his investigation of the records is not.

MR. RYAN: Very well.

THE COURT: I am assuming everything this witness says he saw are actually in evidence.

Is that right, Mr. Bender?

MR. BENDER: I don't know what he is going to ask him.

THE COURT: I mean what he said so far?

MR. BENDER: I don't know.

THE COURT: He talked about 15 to 104, is it?

MR. RYAN: Right.

THE COURT: Which are the contracts?

Give me the numbers.

THE CLERK: They are not in evidence.

MR. BENDER: They are not, except in isolated instances.

THE COURT: The stipulation you entered into --

MR. RYAN: He wouldn't stipulate to the allocations.

THE COURT: The stipulation does not say if the witnesses were called -- what is the stipulation?

MR. BENDER: You mean this stipulation (indicating)?

THE COURT: Yes.

MR. BENDER: It was only as to the money, $42,000in extras --

THE COURT: Every purchaser paid the corporation & the direction of Mr. Hornberger --

MR. BENDER: No, the stipulation -- I have it here.

THE COURT: What is the numberof the stipulation.

THE CLERK: It was marked 139 in evidence.

THE COURT: I have it here. I read it to the jury this morning.

"It is hereby stipulated and agreed that government's exhibits 14 through 107 is received in evidence --"

MR. BENDER: Yes.

THE COURT: " -- representing 92 separate transactions."

MR. BENDER: I stipulated to that.

I didn't know what you meant.

I did not stipulate to allocations.

THE COURT: When you say "92 separate transactions" doesn't it show the closing statements, the name of the seller --

MR. RYAN: We marked them, but during the pretrial he objected to the closing statements.

THE COURT: What are exhibits 14 through 107?

MR. BENDER: Checks --

MR. RYAN: Correspondence --

MR. BENDER: I am sorry, you can answer that.

MR. RYAN: I would say the records fall into the following categories:

Checks --

THE COURT: Checks made to whom, Mr. Hornberger?

MR. RYAN: Yes.

MR. BENDER: Could Mr. Hornberger be excused for a moment?

THE COURT: Yes.

(Defendant Hornberger leaves Courtroom.)

THE COURT: Correspondence between the purchaser and the selling corporation?

MR. RYAN: Yes.

THE COURT: All right.

MR. RYAN: I would say that is essentially the

categories.

Mr. Bender -- you were not there -- objected. I wanted to mark the closing statements without having the people come in and any contracts of sale. I wanted those, but he said no not at that time.

THE CLERK: Some are in.

MR. BENDER: Those are the buyers.

If you want them in, I have no objection.

MR. RYAN: And the bank statements?

MR. BENDER: I have no objection.

THE COURT: Does this witness need any more than that to express an opinion?

MR. RYAN: He can't express an accurate one, as Mr. Bender knows, because the correspondence was not -- there were conflicting documentation. The correspondence was not accurate. There may be correspondence from Story Book Homes, but the main sale was under Dotal Corproation ad the title went from Dotal to the buyer.

Based upon all the documentation available, even though it's conflicted, we allege based on this documentation that we have been able to get, that the extras done on this particular house, recorded in the books as income to that particular

corporation, should be extra income to that particular corporation.

THE COURT: Didn't Mrs. Coletti's deposit slips show every extra on every sale?

MR. RYAN: She never saw extras.

MR. BENDER: Yes, she did.

THE COURT: Yes.

MR. BENDER: She signed them.

MR. RYAN: She signed one letter because there was no other girl around.

THE COURT: The deposit slips.

MR. RYAN: She knew nothing about this $156,000.

MR. BENDER: The Court is right, she testified that on the deposit tickets or the back of the checkbook stub -- whenever she made a deposit to the corporation --would be allocated to the job number.

THE COURT: That is the purchase price?

MR. BENDER: Yes.

THE COURT: The contract price.

MR. BENDER: She didn't do it with extras, she didn't so testify.

MR. RYAN: She never saw extras.

THE COURT: The only one the evidence shows

that dealt with the extra checks -- the proceeds -- was Mr. Hornberger and he deposited them into his account.

MR. BENDER: No no.

MR. RYAN: Right.

MR. BENDER: Charlotte Waugh testified, Rita Perrin testified --

THE COURT: They testified he opened up all the mail.

MR. BENDER: That she received acknowledgement of payment.

THE COURT: You are saying you must have some showing that the extras were performed in the name of the corporations and that the money -- the proceeds for those extras were deposited in Mr. Hornberger's personal account?

MR. RYAN: We say he should have reported that money.

THE COURT: Let's go back a little.

What evidence do you have in the record now -- in the form of exhibits, that shows the corporation performed the extras and that Mr. Hornberger deposited the moneys into his personal account?

(Continued on next page.)

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MR. RYAN: Let me think about that for a moment. It is not easy to answer.

We do not and have been unable to get the actual -- we have no witnesses who testified to what contractor did the job for what corporation. We could not get that. As Mrs. Coletta said, all extras were paid out of whatever corporate bank account had money. There was no accurate record as to whether these main sales and the extras were broken down and performed by a particular corporation. There is no accurate-clear record to reflect that.

In the absence of any clear record that says extras performed by Dotal, we have to rely on the other documents.

THE COURT: You have all the contracts in, don't you?

MR. BENDER: No.

MR. RYAN: We have whatever contracts we were able to get.

THE COURT: In the absence of that, you have proof that a particular corporation contracted for the sale, don't you?

MR. RYAN: In the absence of a contract, we'd have the recorded deed, we'd have the corporate

record which shows the income from that job --

THE COURT: Exactly.

Now, you know who the seller is?

MR. RYAN: Correct.

THE COURT: From that Mr. Mazzella, would you express an opinion whether the extras were performed by the same corporation thatbuilt the house?

THE WITNESS: Yes.

THE COURT: There is a showing that the corporation was entitled to the extras.

MR. RYAN: Right.

THE COURT: I am trying to find out on what you can base an opinion. It has to be on something in the record. If it is not in the record, then the witness must identify the specific documents upon which he relied for the opinion and offer them into evidence.

What you have to show is the extras on each house that the various corporations built.

MR. RYAN: We have correspondence relating to the extras.

THE COURT: You have correspondence on every house as it relates to every extra?

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THE WITNESS: On most.

THE COURT: Now you have the extras.

Now, do the bank statements relate in time and amount to the extras charged?

MR. RYAN: No, the bank statements deal with the main sale.

THE COURT: I am talking about Mr. Hornberger's personal accounts.

For example, Mr. X paid $2,300 on February 2nd, 1968.

Is there a deposit of that same amount on February 3rd or 4th?

MR. RYAN: Absolutely. We have the actual check and everything.

THE COURT: Come on, ask the question. Refer to what is in the record and not what his investigation was.

MR. RYAN: Well, the difficulty with that is with this point there are some records he relied on which are marked for identificationand not in evidence.

THE COURT: That's all right.

Are they marked here?

MR. RYAN: Yes.

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THE COURT: Then refer to it. I will allow it.

MR. RYAN: The bank statements and I will mark them for identification right now.

THE COURT: All right, get your hypothetical up and based it on substance of fact and matters that support them in the record or marked here for identification.

MR. RYAN: Very well.

THE COURT: I am only trying to get you to frame a proper hypothetical, based on Mr. Bender's objection. Most of his objections related to hearsay evidence. I doubt that they are valid, on a hypothetical.

Are you ready to proceed?

MR. RYAN: I would like to mark these bank statements?

THE COURT: When you say "bank statements" are these the corporate bank statements?

MR. RYAN: No, these are the building loan bank statements which state seller, buyer and job number.

(Shown to Court.)

THE COURT: These are statements of the

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Roosevelt Savings Bank.

Show them to Mr. Bender.

MR. RYAN: I will and he had them for some time.

THE COURT: Any objection?

MR. BENDER: In marking them into evidence?

THE COURT: Yes.

If you waive any objection to genuineness and you agree that they are made in the regular course of bank business, I won't ask you to concede.

MR. BENDER: To those?

THE COURT: I will make a ruling.

MR. BENDER: do they refer to the 92 buyers?

THE WITNESS: Yes, they do.

MR. BENDER: I have no objections.

THE COURT: Let them be marked.

THE CLERK: Numerous bank statements marked government's exhibit 142 in evidence.

(So marked.)

THE COURT: We are goingto work late tonight. I hope you gentlemen do not have anything to do.

MR. BENDER: I can't get the requests out.

THE COURT: What was that?

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MR. BENDER: It is important to get you the requests. I cannot if I am working late.

THE COURT: They are late already. They were due at 4 today.

MR. BENDER: It is impossible to get them out. It might be a good idea to get the requests in to your Honor.

THE COURT: I insist on it as a matter of fact.

MR. BENDER: I would love to. I feel it would assist the Court.

THE COURT: I will give you the opportunity.

MR. BENDER: We should suspend at 4:30.

THE COURT: I cannot do that. I have to finish this case by Friday or else I have real trouble.

MR. BENDER: There is no such thing that you have to finish it by Friday.

THE COURT: I know there is no edict from the law.

MR. BENDER: I want to see you around a little longer.

He may be the last witness. We are certainly moving along.

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THE COURT: You wouldn't want to tell me if you have any witnesses?

MR. BENDER: I would be glad to. It is my intention to put the defendant on the stand and I will have one other witness and just two or three character witnesses.

THE COURT: We should be able to sum up tomorrow.

MR. BENDER: Not tomorrow, Friday.

If you want to sum up tomorrow --

THE COURT: I can't ask you to sum up until the case is over.

If the evidentiary part of the case is completed at 2, 3 or 3:30, we will not call a recess until Friday for summations. I would like to give it to the jury Friday morning.

MR. BENDER: Yes, I would like to suspend at 4:30 so I can get the requests out.

THE COURT: I will do the best I can.

MR. RYAN: I'd like to tell you how I would be proceeding under your Honor's guidelines.

I will ask the witness whether based on exhibits 14 through 107 now in evidence and 142 and the work papers as shown in exhibits 115, is he able

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to state an opinion as to what corporation the extras --

THE COURT: The proceeds of the extras.

MR. RYAN: -- are allocated to for income purposes.

THE COURT: The jury is not going to understand that.

MR. RYAN: Should have been reported by each corporation for income purposes.

THE COURT: Do you think that's a conclusion of law not to be expressed by an expert?

I think it is a mixed questionand I will allow it.

MR. BENDER: I think very frankly it is the ultimate question of fact that the jury has to decide. It is objectionable and I object to it.

THE COURT: The new rules say it is not.

MR. BENDER: They are not in effect yet.

THE COURT: In the main they are expository and not a modification.

MR. BENDER: I didn't want my silence to be an indication --

THE COURT: I thought that would be the objection. It is the one that came to my mind, but

I will overrule myself on it.

The point I want to make, I am not telling you what questions to ask. I am pointing out to you it must be based on evidence in the record. If it is marked for identification, I will allow it.

MR. RYAN: All right.

Of course, the public records that he saw with his own eyes, Mr. Bender does not dispute the public records. In fact he thinks it supports him.

MR. BENDER: I do not hear that.

MR. RYAN: We do not have the deeds for each sale, so they couldn't be marked for identification.

THE COURT: Would you object to him saying he examined the records and these are the corporations that conveyed title to the respective purchasers?

MR. BENDER: If he says he did.

THE COURT: You say that he did go to the County Clerk's Office?

THE WITNESS: I had my other special agents working for me who went and they prepared schedules and furnished me with the identifying numbers.

MR. BENDER: Like this, Mr. Mazzella, which has been given to me by Mr. Ryan and yourself?

THE WITNESS: Yes.

THE COURT: Any objection to that?

MR. BENDER: No.

THE COURT: All right, seat the jury.

MR. BENDER: I do object to being here until 6:30.

THE COURT: I join in the objection.

MR. BENDER: I would like the record to show that I said that in jest and it should not appear that you are coercing me in any way.

THE COURT: I hope you don't tell someone upstairs that I forced you to say that.

MR. BENDER: I don't think so.

(Jury present.)

DIRECT EXAMINATION

BY MR. RYAN: (Cont.)

Q Mr. Mazzella, I was asking you about extras and the respective corporations. Do you recall that?

A Yes.

Q Now, putting before you exhibits 14 through 107 and exhibit 142, which has been received in evidence during this recess and which are the Roosevelt Bank loan statements --

THE COURT: You are going to ask the witness to express an opinion. First qualify him.

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Q How long have you been with the Internal Revenue Service?

A 13 years.

Q And in what capacity were you in the service in the beginning up until today?

A I was with the collection division for the first -- approximately -- 8 years.

THE COURT: What is your background in education?

THE WITNESS: I have a Bachelors of Arts and a Masters of Art.

THE COURT: All right, go ahead.

Q After you left the collection division, what did you do?

A I became a special agent with the Intelligence Division.

(Continued next page.)

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Q Are you familiar with the Internal Revenue Code and its laws?

A Yes, I am.

THE COURT: Have you ever testified in Court before?

THE WITNESS: No, your Honor.

THE COURT: Never expressed an opinion as an expert?

THE WITNESS: No sir.

Q Now, in connection with these 93 --

THE COURT: Do you question the qualifications?

MR. BENDER: No, I do not, your Honor.

THE COURT: All right. I find the witness qualified on the consent of the defendant.

Q In addition to examining the exhibits as shown in 14 through 107 and the bank statements, 142, did you examine any other records with respect to determining extra income to the resepctive corporations?

A Yes, I did.

Q Did you do it personally or cause it to be done?

A I caused it to be done.

Q What records were examined?

A The public records at the County Clerk's Office, and I also examined the Internal Revenue agent's work papers.

Mazzella-direct

Q Based on the results of -- what public records did you examine? Cause the examination of?

A The real property sales at the County Clerk, the transfers of deeds.

Q All right. Relating to these 93 transactions?

A That is correct.

Q Based on the results of the examination of the deeds on file in the County Clerk's Office, Exhibit 142, the Roosevelt Bank savings statements, and Exhibits 14 through 107 relating to each of the 93 sales, are you able to state an opinion as to what corporations should have reported the extras received by Mr. Hornberger?

A Yes, I can.

Q With respect to the Dotal Corporation, will you give us your opinion?

A With respect to the Dotal Corporation, for the year 1967, there were -- it looks like eight sales.

Q When you say "looks like," will you tell us with some degree of certainty?

MR. BENDER: And could we, if you don't mind, may we, your Honor, have Mr. Mazzella just indicate what he's reading from, so we can follow him?

THE COURT: Yes. If you are reading from an exhibit, state the exhibit for the record.

THE WITNESS: I have my copy here. Q. Q. There are eight sales. However, there is a ninth transaction in the amount of one thousand dollars which we could not identify as a sale of a --

BY MR. RYAN:

Q Does that deal with the 93 transactions involved in this case?

A No, it does not.

Q Well, I am not asking about that.

A All right. With respect to the 93 transactions--

Q First of all, I'm asking you about the Dotal Corporation. Transactions --

A All right. There are four sales here that are part of the 93 transactions involved.

MR. BENDER: May I inquire where is "here"? What exhibit is that?

MR. RYAN: Let me mark these documents. Perhaps it would move things along.

Twelve pages of schedules, please.

THE CLERK: Marked Government's Exhibit 143 for identification.

(So marked.)

Q I show you 143 for identification. Do you recognize those documents?

A Yes, I do.

Q Will they assist you in giving your opinion?

A Yes, they will.

Q Did you prepare those schedules?

A Yes, I did.

Q Will you state your opinion as to what amount of extras should have been reported on the Dotal Corporation income tax return for the year '67?

A Five thousand,four hundred eighteen dollars, thirty-four cents.

Q For the year '68?

A Fourteen thousand, two hundred twenty-one dollars, ninety-one cents.

Q Can you state your opinion as to what amount of the extras received by Mr. Hornberger should have been reported on the Horn Enterprises corporate tax returns for the year 1967?

A Fifteen thousand --

MR. BENDER: Excuse me, your Honor. I'll object to the form of the question.

THE COURT: May I have the question again?

(Record read.)

THE COURT: Sustained as to form.

I will allow the witness to express an opinion

as to whether the proceeds of the extras were due a particular corporation and what amount.

BY MR. RYAN:

Q With respect to the Horn Enterprises Corporation, can you state an opinion as to what amount of proceeds from the extras should have been reported on the Horn Enterprises corporate tax return?

A For 1967, it is fifteen thousand, four hundred twenty-six dollars.

Q For the year 1968, can you state your same opinion?

A Yes, I can.

Q How much?

A It is one thousand,thirty dollars.

Q Now, for the Story Book Manor Corporation, can you state your same opinion?

A Yes, I can.

Q How much?

A For 1967, it is eleven thousand, two hundred forty-one dollars, thirty-five cents.

Q Can you give your same opinion as to the year '68 for the Story Book Manor Corporation?

A Yes, I can.

Q How much?

A Thirty-seven thousand, forty-nine dollars, fifty cents.

Q I'd like to turn to the Story Book Homes Corporation. Can you state your opinion for the year 1967 relating to that corporation?

A Ten thousand, seven hundred dollars, fifty cents.

Q Can you give your opinion as to the year '68 for the Story Book Homes? Correct?

A Yes, I can.

Q How much?

A Sixty-one thousand, two hundred twenty-six dollars, fifty cents.

Q Have I covered all four corporations?

A I believe you did.

Q OK. Now, will you tell us the basis for your opinion that the proceeds from these extras should have been reported on those resepctive corporate tax returns in those amounts?

A From an examination or inspection of the work papers of the Revenue Agent, from an inspection of the public records --

MR. BENDER: Excuse me. Could we stop here for the moment and find out what revenue records he's referring to, which are an exhibit in the case? Or is

marked for identification?

THE COURT: Identify by exhibit number or by the Agent. Was it Gerimia? Vilardi?

THE WITNESS: It was Vilardi.

THE COURT: That's Vilardi?

THE WITNESS: Vilardi.

MR. BENDER: That would be 115, the one hundred fifteen series for identification.

THE COURT: 115A, I think it is.

BY MR. RYAN:

Q Contained in 115. We went through this this morning; is that correct?

A Yes.

Q How about Mr. Gerimia's record?

A Also his work papers.

Q All right.

A Also the Roosevelt Savings Bank's records, closing statements, sales contracts, correspondence and some checks.

Q All right. May --

THE COURT: Did you base it on any measure on the corporate books?

THE WITNESS: Yes, your Honor.

MR. BENDER: No. The question was not asked

in that way, your Honor.

THE COURT: Well, I am asking it.

THE WITNESS: Yes, your Honor.

THE COURT: Did you examine the corporate books?

THE WITNESS: I did not see the corporate books with respect to these transactions. I relied on the Revenue Agent's work papers.

THE COURT: Oh, that is what I wanted to know.

BY MR. RYAN:

Q That referred to job numbers?

A Right.

Q All right. Do you have a schedule of the amounts which you've just testified to?

A Yes, I do.

Q May I have them? I mean, the amounts that -- which you in your opinion state should have been reported on the respective corporate tax returns?

A Yes, I do.

Q May I have them? Is this 143?

A That is correct.

Q Let me see it for a moment.

A Yes.

MR. RYAN: I offer them in evidence.

MR. BENDER: Mr. Ryan -- I have been given a

copy of this pre-trial, according to our discovery, and there are certain items on here --

THE COURT: Do you want me to excuse the Jury? The Jury is excused.

(The following occurred in the absence of the Jury.)

MR. BENDER: I think you ought to take a look at this, your Honor. There are names of buyers that are listed where the record indicates that they couldn't locate the buyer or they couldn't locate records or they don't know who it is. I don't think that those are --

MR. RYAN: I'm not offering it for that purpose.

MR. BENDER: That's the reason why. It's getting so, your Honor, I hope this Jury doesn't think that I'm delaying this constantly and they're going out and back.

THE COURT: You point out what you want eliminated and it will be eliminated. There's no reason records not located should be in.

MR. BENDER: If he was only offering it on a limited basis, I wouldn't have made the objection.

MR. RYAN: I'll tell you what. Tonight I'll

prepare another schedule and I'll offer it in evidence tomorrow, eliminating the objectionable material.

THE COURT: Suppose you go over it in red pencil, Mr. Bender.

MR. BENDER: If there is anything --

THE COURT: Mark it out.

MR. BENDER: All I'm saying is that no name is--

THE COURT: All right. What I would like you to do is mark out everything that you say is objectionable. Mr. Ryan is willing to offer it on that basis?

MR. BENDER: He said so.

THE COURT: But I want to make sure what you say is objectionable. Then it will be marked. Then tomorrow Mr. Ryan will prepare a new exhibit eliminating the matters that you say should be excised.

MR. BENDER: All right. Can we then go on and take this subject to that and let him just confine this exhibit solely to the buyers whom the Government says had paid for extras which were omitted?

THE COURT: It won't take too long for you to-- I can see the few places there.

MR. BENDER: There is quite a list.

THE COURT: All right. It's a matter of just

striking it. If you don't like it, strike it.

We will take a short recess and you tell us when you are ready, Mr. Bender.

MR. BENDER: OK.

(Recess taken.)

(continued on next page)

THE COURT: Are we ready to proceed?

MR. RYAN: Yes, Mr. Bender made some notation and I am going to prepare a schedule acceptable to him.

THE COURT: Let it be marked in the form that it has been altered. It won't be exhibited to the Jury.

MR. BENDER: I think Mr. Mazzella called to my attention and Mr. Ryan that the exhibit marked is an incorrect exhibit. It is incomplete.

THE WITNESS: Yes.

MR. RYAN: Let me have the one that you marked.

MR. BENDER: It is my only copy.

MR. RYAN: I would only like to mark it.

THE COURT: At least we know that you agree to this.

MR. BENDER: On what basis does this go on --

MR. RYAN: Of his work.

MR. BENDER: Which reflects his opinion?

MR. RYAN: Yes.

THE COURT: They are only guides to the Jury and I will so instruct them.

MR. BENDER: Okay.

THE COURT: I understand it is in the form

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of a summary, which are admissible.

MR. BENDER: I am not --

THE CLERK: 14-page schedule marked Government's Exhibit 144 for Identification.

(So marked.)

THE COURT: You can seat the Jury now.

(Jury present.)

MR. RYAN: With respect to that schedule, I will offer it tomorrow in its correct form.

I have no further questions, thank you.

CROSS-EXAMINATION

BY MR. BENDER:

MR. BENDER: Excuse me one moment, your Honor.

(Pause.)

Q Mr. Mazzella, as a special agent of the Intelligence Division, when you came into this case, your function was to determine whether evidence existed to indicate a criminal violation of the Internal Revenue laws; is that right?

A Yes.

Q That's primarily your function as a special agent?

A That's correct.

Q And when you came in on the investigation,

you knew that you had this informant or informer's complaint from a lawyers; is that right?

A That is correct.

Q And I think you told us the first time you talked with Mr. Hornberger was September 14, 1972?

A Yes.

Q How long prior to September 14, 1972, had you actually been in on the investigation?

A I was assigned the investigation during June of 1972.

Q And between that time and the time that you interviewed Mr. Hornberger, in September -- September 14, 1972, you had not as yet contacted any of the purchasers of the houses that had bought the houses in '67 and '68?

A I don't recall --

Q I take it as of September 14, 1972, you didn't know too much about -- if at all about the contracts that are being charged as having been omitted at this time up until September 14th?

A That's correct.

Q In your conversation with Mr. Hornberger, did Mr. Hornberger tell you that he had had extras -- did he volunteer to you that he had had extras which he had received in the form of checks from buyers which he put into his own

personal accounts?

A He did not volunteer this information. I had questioned him about it.

Q You didn't know anything about it?

A I had some indication.

Q I asked you before, you hadn't talked to any of the lawyers -- didn't I ask you that?

A Correct.

Q And you didn't have any information really about extras you told us; isn't that right?

MR. RYAN: Objection. That wasn't the answer.

THE WITNESS: No.

Q You asked him questions about the extras?

A That's correct.

Q Do you say anything in your memorandum to indicate anything other than the fact that he told you that he had received extras in payments and deposited them into his own personal account?

A I had asked him the question.

Q You had asked him what question?

A About the questions on extras.

Q You asked him about the questions?

A Yes.

Q Where do you have that in your memorandum?

A I don't have it in my memorandum but I do recall asking him the question.

Q As you sit here, two years ago, you remember asking him that question?

A That's correct.

Q You made out a two-page -- three-page memorandum of your conversation on that day, did you not?

A That's correct.

Q I am referring to Defendant's Exhibit N for Identification. That memorandum constituted the best of your recollection that transpired at that conference, yes or no?

A Yes.

THE COURT: If you can answer it yes or no.

MR. BENDER: Excuse me. If you can answer it yes or no.

THE WITNESS: Yes.

Q At any event, whether you say you asked him or you didn't -- withdrawn.

You say you asked him about an extra or extras, what did you ask him?

A I asked him the source of the deposits to the advance account.

Q It was in response to that that he said to you

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that"I received extras"-- just a moment -- let me finish -- "I received extras and I received them by instructing the buyers to make the checks payable to me, which I deposited in my personal accounts," is that right?

A No, sir.

Q Isn't that what you just told us he told you which is reported in your memorandum?

MR. RYAN: Objection.

THE COURT: Sustained.

Q Did he tell you that he directed various customers to make checks payable for extras to him personally?

A Yes, he did.

Q Anddidn't he tell you the reason why?

A Yes, he did.

Q You didn't tell us this on your direction, did you, as to what occurred when Mr. Ryan asked you?

A No, sir.

THE COURT: I will instruct the Jury that a witness may only answer the questions that are put to him.

Normally the answer to anything in addition are stricken.

MR. BENDER: I most respectfully take exception to your Honor's remakr. The question Mr. Ryan asked

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he should relate the entire conversation to the best of his recollection.

MR. RYAN: That was not the question.

THE COURT: The Jury will recall, if the question called for the answer that was omitted, then you may consider the failure to answer the question as an inconsistent statement, but again I say to you that a witness may answer only the questions that are asked him and you have listened to me direct witnesses to answer only yes or no on direct or cross-examination.

You may proceed.

BY MR. BENDER:

Q Didn't he tell you on the first meeting that you had with him the reason why he directed the customers to make the checks payable to him which he wanted and did deposit in his personal accounts?

A Yes, he did.

Q What reason did he give you?

A He said that he wanted to make certain that none of the customers would stop payment on his checks.

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CROSS-EXAMINATION

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BY MR. BENDER: (Cont.)

Q What else did he tell you with respect to that -- excuse me.

A In this fashion, the home owner could not withhold payment because of counterclaims against the corporation.

Q What he was telling you, if the check was made payable to the corporation itself for the extras, and there was a dispute as to whether or not the extras were properly done or not, and the buyer would refuse to pay for it on that basis, the corporation might not be able to collect -- the buyer would have a defense against that check; is that right?

A Yes.

Q Whereas if he made it out personally to him --

THE COURT: Are you asking whether this is what Mr. Hornberger said?

MR. BENDER: Yes.

THE COURT: Or is it correct as a matter of law?

MR. BENDER: No, your Honor.

THE COURT: I want to make it plain.

MR. BENDER: I am only referring to what

Mr. Hornberger said to him.

THE COURT: Only as to what Mr. Hornberger said.

BY MR. BENDER:

Q Whereas he told you if he directed the check be made to him personally and not to the corporation -- if the buyer sued the corporation -- the check would be to him and he would have -- be in effect the holder --

MR. RYAN: Objection to the form of the question.

THE COURT: Objection sustained.

Q He told you at least by making the check payable to him and him depositing it, the buyer would not have a defense for the non-payment of the check for the extras?

MR. RYAN: Objection as to form.

THE COURT: Is that what he told you?

THE WITNESS: Yes.

THE COURT: Substantially?

THE WITNESS: Yes.

Q Didn't he tell you that was the sole reason why he had had checks paid payable to him by the buyers?

A Yes.

Q He also told you, did he not, that he believed

that everyone of those extras were being picked up and reported by the corporations to whom they belonged isn't that right?

A Yes.

Q Actually you have found from what you have testified today that all of those extras which were deposited into his three personal accounts in '67 and '68, actually were redeposited into the corporate accounts -- isn't that right?

A All of them.

Q The 156,000. Is that right, is that what you told us -- give us take a few dollars?

A Yes.

Q Now, with respect to the extras, which you said each corporatic should have reported but which they did not, you gave your opinion to that effect based upon reports in evidence, is that right?

A Yes.

Q You didn't rely now on any conversation that you may have had with any third paries like buyers or anything -- just records in evidence; is that right?

MR. RYAN: Objection to the form of the question.

THE COURT: Overruled. I will allow it.

MR. BENDER: I think he has answered it already.

MR. RYAN: I don't think the witness understood the question.

THE COURT: Mr. Ryan, you may make an objection and you already did and I overruled it. And don't indicate to the witness that he may not have understood the question.

MR. RYAN: May I respectfully state I didn't intend to convey that to the witness.

THE COURT: The witness already answered.

THE WITNESS: Would you repeat the question.

(Record read.)

THE WITNSS: I would say so.

BY MR. BENDER:

Q "No, I did not rely upon anything other than records in evidence,"is that right?

THE COURT: You did rely on other matters?

THE WITNESS: I did have other matters, right.

Q On which you based your opinion?

A Right.

MR. BENDER: Then I move to strike the opinion. If the opinion is based on any information -- sorry, your Honor.

THE COURT: Was it based on the schedules, do you consider that the records in evidence, schedules made by the agents?

THE WITNESS: Yes.

THE COURT: Was there anything besides that?

THE WITNESS: I was thinking of conversations with the accountant, Mr. Canale.

THE COURT: Did you tesitfy to that -- you testified to those conversations, didn't you?

THE WITNESS: I don't know -- yes, I did, right.

THE COURT: In other words, did you also rely on testimony that's in the record -- testimony that you gave or any other witness gave.

THE WITNESS: Yes.

THE COURT: Is there anything that you relied on outside of matters introduced into the record in this court?

THE WITNESS: No, sir.

THE COURT: All right, motion denied.

BY MR. BENDER:

Q Now, before I get to these schedules, on which you based your opinion, you also had another interview with my client on October the 10th, 1072, did you not,

Mr. Mazzella?

A Yes.

Q And didn't he at that time when you confronted him with the total amount of the stockholders advances, say to you that he did not know why those amounts were posted to his credit in the stockholders advance account?

A No, sir.

Q He did not tell you that?

A May I make --

THE COURT: No, just answer the question.

Q Did he at any time say to you, when you asked him about the stockholders advances, that he knew that the girl was crediting his stockholders advances with these amounts?

A I can't answer that.

Q You mean you can't answer because you did not ask him?

A You are referring to a different year.

Q I am asking with respect to 1967 and '68.

A No, sir, he did not say that.

Q You did not ask him?

A No, sir.

Q And he did not tell you?

A Not on that occasion.

Q But you did ask him with respect to the stockholders advances as to 1969?

A Correct.

Q And he said he didn't know why these amounts were being posted to the stockholders advances; is that right?

A Yes.

(continued next page.)

CROSS-EXAMINATION

BY MR. BENDER: (Cont.)

Q And you do know, do you not, that these stockholders advances for the two years of 1967 and 1968, which were credited by Mr. Canale to Mr. Hornberger's stockholders advance account, totalled $248,000?

You know that, don't you?

A I've been told that, yes.

Q You examined the stockholders advance account in those two years, did you not?

A Yes.

Q Didn't you see that from the books and records?

A I saw some indication.

Q Now, you've testified under Mr. Ryan's questioning with respect to certain entries in the stockholders advance account which you said came from checks drawn upon Mr. Hornberger's personal accounts, didn't you?

A Yes.

Q And you mentioned, for example, under Horn for 1967, the amount of $5000, which was entered as a credit as of February 16, 1967? Do you recall that?

A Yes.

Q Was that a check which was issued out of Mr. Hornberger's personal account?

A Yes, it was..

Q Wasn't it a note?

A No, sir.

Q I show you Schedule H in evidence which was taken from the records, according to Mrs. Trudy Paterno.

A Yes.

Q You say that notation is incorrect?

A Yes.

Q You do? Do you see the $4000 which is marked as a transfer is incorrect?

A No.

Q It is a transfer, is it not?

A Yes.

Q Now, you've omitted in your schedule the various salary checks which were credited to the account; isn't that right?

A Yes.

Q You also omitted credits to the account which were journal entries, reclassifying the credit out of the suspense account; isn't that correct?

A Yes.

Q Now, you did that, did you not, because you were simply trying to tie in just similar amounts of extras which came out of his account and which were redeposited

in the corporation?

A No.

Q But you didn't mean by giving us this schedule to imply that these --the amounts that you gave us were the sole amounts amounts which were credited to the stockholders advance account for these years?

A No.

Q I mean, there is no question that from your -- what you have done, is just sort out certain entries in the stockholders advances and leave out some others; isn't that right?

A Yes.

Q Outside of the ones that you have traded which came out of his personal account and credited to the stockholders advances, were you able to trace out all the other items which constituted the entries in the stockholders advances?

A Would you repeat that question?

THE COURT: Mr. Rudolph, will you please do it.

(Record read.)

A No.

Q You don't know where that -- those sources of monies came from?

A Some of them.

Q Just some of it?

A That's correct.

Q Now, your opinion of -- to what a corporation, the extras should have been reported as income, was it based in part on revenue Agent Vilardi's schedules?

A Yes.

Q And are those the schedules which are marked 115F for identification, which pertains to Dotal for 1967; 115E and D, which is Horn Enterprises, for 1967 and 1968 and 115G, Dotal, 1968; and 115H and I which is Manor 1967 and 1968?

A Yes.

Q Now, did you rely upon those schedules to the extent that whatever corporations Mr. Vilardi scheduled those names of those buyers under, you accepted that as being the corporation that had sold the house to that buyer?

A Yes.

Q And you allocated the extras, that that buyer ordered to that particular corporation, based upon Mr. Vilardi's schedule?

A Yes.

Q Well, let's take Dotal, for example, you've got four buyers you testified to: A Mr. George, a Mr. Seidner,

a Mr. Cummings and then there is some fellow by the name of Allmaras for just $69.

So, let's stay with three; George, Cummings and Seidner. Now, based upon -- now, all that you did -- now, did you do -- did you rely upon any other record in that evidence -- any other evidence in that record -- in this record besides Mr. Vilardi's schedule on the basis of which you treated the extras which were paid by these three buyers; George, Cummings and Seidner, to Dotal? And concluded that, in your opinion, Dotal should have picked up the income from those omitted extras? Anything else besides Mr. Vilardi's schedule?

A No.

Q Nothing? Nothing?

A I relied on this schedule.

MR. RYAN: I believe they are in this folder.

MR. BENDER: Thank you very much, Mr. Ryan.

BY MR. BENDER:

Q Mr. Mazella, I'm handing you a folder which is marked Exhibit 15 in evidence, 15A in evidence, 15C in evidence, and 15 B.

Now, this pertains to Mr. and Mrs. Anthony George; is that right?

A Yes.

Q And the checks are made for the extras personally to Mr. Hornberger; is that correct?

A Yes.

Q And they would be Exhibit 15.

Now, 15A is a letter from Horn Enterprises to Mr. & Mrs. George, listing all the extras; is that right?

A Yes.

Q And that's not Dotal? THat's Horn; is that correct?

A That's correct.

Q The closing statement which is 15C indicates that the seller of the house is Horn Enterprises; is that right?

A Yes.

Q And 15B, which is the contract of sale is an agreement entered into between Horn Enterprises and George; is that correct?

A Yes, sir.

MR. BENDER: Excuse me, your Honor.

Q And when you examined the Suffolk County Clerk's records, you found that the deed, did you not, was --

Q Was a deed conveyed by Horn Enterprises to MR. George?

A Yes, that is right.

Q On what basis then did you render an opinion that those extras were extras which were ordered from Dotal and which were omitted from Dotal's tax return?

A Because an examination of the work papers of the revenue agent indicated that Dotal reported the sale of the house. So on that basis, it was determined that the extras should be allocated to Dotal.

Q Despite the evidentiary material which I have shown you, which is the contract of sale, the letter from Horn Enterprises on the extras, the closing statement, you still contend, as your opinion, that those extras are extras which should have been reported by Dotal corporation for 1967?

A Yes, I do.

Q And what do you base your opinion on?

A Consultations with various individuals in the internal revenue service.

MR. BENDER: I move to strike that. I'm talking about something in evidence.

THE COURT: Wait.

If there is a motion, I have to consider it.

MR. BENDER: Sorry, your Honor.

THE COURT: Give me the question and the

answer.

(Record read.)

THE COURT: Motion denied.

MR. BENDER: Your Honor, I -- giving an opinion based upon these records.

THE COURT: You asked a question and he gave an answer responsive to the question.

BY MR. BENDER:

Q Would your answer -- I would like to know what did you base your opinion on with respect to the records of which you say you looked at to render an opinion?

MR. RYAN: Objection. Asked and answered.

THE COURT: Well, then answer it again.

A Since the corporate records reported the sale of the house that's involved here, I determined that the sale of the extras should also have been reported along with the sale of the house, together on Dotal Builders.

Q I show you 129 in evidence, which is Horn Enterprises' ledger.

Would you be able to look at that book and tell us whether or not Job No. 4, which is the job that is the job number of the house the Georges bought, is listed in Horn Enterprises? Are you familiar enough with those books to be able to find it?

A No, I am not; no, sir.

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Q And I take it your answer would be the same as to Dotal; is that correct?

A That is correct.

Q Let's look at Mr. Cummings. You have Mr. Cujmings over there?

A Yes, I do.

Q Now, Mr. Cummings, all that there is here from him is a check to Mr. Hornberger for $1155, and a closing statement, which is 16-A; is that right?

A Correct.

Q And the closing statement indicates that Horn Enterprises sold the house to W & J Cummings; is that right?

A Yes.

Q Do you have the contract on that house? Excuse me. Do you also have the bond and mortgage from Roosevelt Bank which was just put in evidence? The big batch? Oh, here they are.

THE COURT: Did you call for the bond and mortgage?

MR. BENDER: Did I call it what, your Honor?

THE COURT: Did you call for the bond and mortgage?

MR. BENDER: No, I didn't.

I called for the -- I thought I called for the bond and mortgage record, but I may have said "bond and mortgage."

THE COURT: Oh.

MR. BENDER: Did I say "bond and mortgage"?

THE COURT: No, you called for the bond and mortgage, and Mr. Ryan handed bank statements over to you.

MR. BENDER: I meant the bond and mortgage record, which he just put in evidence.

THE COURT: Oh.

MR. RYAN: It was put in evidence with the bank statements, not a bond and mortgage.

MR. BENDER: Put in evidence with what bank statements?

MR. RYAN: Bank statements I just handed you, sir.

MR. BENDER: I'm -- This is 142, which I think was just marked in evidence, which is the bond and mortgage records. Is that right?

MR. RYAN: No. They're the bank statements.

THE COURT: They may be records of bond and mortgages or advances, but the point is, I thought you called for the bond and mortgage, and I could not recall that any bond and mortgage was marked in evidence.

But go on. I think you are both talking about the same thing, whatever you call it.

Call it by the Exhibit number, if there is a dif-

ference of opinion.

MR. BENDER: Yes, 142.

THE COURT: All right.

BY MR. BENDER:

Q I show you a record which is entitled Bond and Mortgage Record, Roosevelt Savings Bank, relating to a house sold to W & Joan Cummings, 22 Galahad Lane, Nesconset. Whom does this Bond and Mortgage Record indicate is the owner of this property?

A Horn Enterprise.

Q Not Dotal Corporation?

A No, sir.

Q And the third one is Seidner; is it not? And Seidner is a -- Two checks to Mr. Hornberger for $700 on one, and 1700 on the other, Exhibit 17, and a closing statement, 17-A; is that correct?

A Yes, sir.

Q And the seller is Horn Enterprises; is that right?

A Yes, sir.

Q And that's not Dotal; is it?

A Correct.

Q Do you know what the -- There is no bond and Mortgage Record attached to this. Do you know what that refers -- what that recites?

A I don't understand the question.

Q Do you know whether Dotal is listed as the owner on the Bond and Mortgage Record?

A Do you have it?

Q Well, you said you relied upon it to render an opinion in this case.

MR. RYAN: Objection. Argumentative.

THE COURT: Sustained on the ground that it is argumentative.

Q I show you this Bond and Mortgage Record taken out of Government's Exhibit 142. Did Dotal sell that house to the Seidner's?

A Yes.

Q Dotal did?

A Yes, that is correct?

Q Is that what the Bond and Mortgage says?

A That is right.

Q May I see it?

Doesn't this say, "Owner, Horn Enterprises"?

A That is correct.

Q Where on this record does it indicate that it was Dotal that sold it, the house to the Seidners?

A It's not indicated.

Q But you just said that from this record it's

indicated that Dotal sold it?

A I didn't say that.

Q What did you say?

A You didn't ask me about Dotal, where -- what I based my determination on.

Q I did not ask you what you based your opinion on with regard to the Seidners on Dotal?

A Yes.

Q Well, you didn't rely upon the Bond and Mortgage Record; is that right?

A Right.

Q You didn't rely on the Closing Statement; is that right?

A Right.

Q You didn't rely on the Contract; right?

A Right.

Q You didn't rely on the public record which reflected that the deed was a deed conveyed -- conveying the property from Horn to Seidner; is that right?

A Right.

Q What did you rely upon?

A I relied on the work papers of the Revenue Agent, which --

Q You mean, Mr. Vilardi?

MR. RYAN: Just a moment.

Objection. The witness hasn't finished the answer.

Q I'm sorry. I didn't mean to cut you off, Mr. Mazzella.

A Which indicates that the sale of the house to Seidner, the income on the sale of the house was reported on the return of Dotal Builders. For that reason, I allocated the sale of the extras with respect to Mr. Seidner to Dotal Builders.

Q Would you show me where in the Revenue Agent's report it says so?

THE COURT: 115-A, I believe.

MR. BENDER: Your Honor, to save time, Mr. Mazzella, maybe we'll do it, maybe we won't.

THE COURT: Question withdrawn?

MR. BENDER: I'll withdraw the question.

THE COURT: All right. Next question.

Q You just relied upon the Revenue Agent's reports?

A That is correct.

Q Which was Mr. Vilardi, and for 1968, I think Mr. -- Storybook Homes was Mr. Jeremiah?

A I'm not certain which one.

Q Well, the only one that Mr. Jeremiah testified to, I think, was Storybook Homes, for 1968, which is this --

115-A in evidence; is that right?

A Correct.

Q So it's only Mr. Jeremiah's for 1968, on Storybook Homes, one corporation? Right? And the rest is all Mr. Vilardi?

A Right. Yes.

Q Now, in connection with your examination, did you make a comparison between the price of the house as listed in the closing statement when title passed, and the price that was listed in the corporate records received from the customer for the purchase of the house?

A Yes, I did.

Q And did you do that in all 92 cases?

A No, sir.

Q With respect to those buyers whom you've charged the various corporations failed to report the income from the extras, did you actually find a discrepancy between the price reported on the books for the sale of that particular buyer, and the price listed in the closing statement?

A Yes, I did.

Q Did you find instances where the closing statement reflected a price of, say, $23,000, in which you claimed that that buyer failed to report a $1,000 in extras, and the books of the corporation shows that it picked up from the sale

of that house not 23 but 25,000?

MR. RYAN: Objection.

THE COURT: Overruled. I will allow that.

Q Do you follow the question, Mr. Mazzella?

A Yes, there were some instances.

Q Notwithstanding the fact that on a given sale of a house, where the corporation shows it reported more income from the sale of that house than was reflected in the closing statement, you, nevertheless, still charged with him with extras omitted from the corporate return for that house? Isn't that right?

A That is correct.

Q What was your justification for that?

A The justification is this, that the -- the deposits to income on the various house appear to have been deposited haphazardly, without respect to the amount of the sale involved. In no instance, what -- could I find any of the personal checks deposited to the corporate account. So I could not -- I could not allow the or -- I could not allow the incorporation of the extras on that amount.

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Mazzella - cross

Q Did I understand you to say in no instance a personal check was made to the corporation for extras?

A I don't recall any.

Q You don't recall any?

A Personal -- wait --

Q Well, isn't that what you just said, you don't recall any?

MR. RYAN: Objection.

THE COURT: I will allow it.

Q Am I right?

You made up this schedule, 144, did you not?

A Yes, I did.

Q How about Mr. Piladonia? Wasn't the check paid to the corporation?

A Yes.

Q How about Mr. Ryan, wasn't the check paid to the Corporation for extras?

A Right.

Q Shall I go on?

A No, sir.

Q You do recall there were any number of instances?

A Yes.

THE COURT: Do you recall how many?

Mazzella-cross

THE WITNESS: Not the number. I don't recall how many.

Q Now, you examined the entries in order to come to your opinion, -- render your opinion; is that right?

A On some occasions I have.

Q Now, aside from what was in evidence, did you examine the contracts with many of the buyers -- aside from what is put into evidence?

A I believe so.

Q Did you find in your examination that with respect to the purchases involved here, the 93, that a great many of the extras were listed in the contract or sale?

A There were some listed.

Q Only some?

A Some.

Q Would you say the majority?

A No, sir.

Q Would you say less than the majority?

A Yes, sir.

Q Could you give us a rough idea -- talking about the 93 or 92 purchases --

THE COURT: When you ask about majority, what he saw or a majority of the 92 or 93?

Q About how many of the 93 did you see?

Mazzella-cross

A I would say 5 or 7.

Q That is all?

A To the best of my recollection.

Q Would you do me a favor and look at your schedules now and tell me how much omitted extras you have charged should have been reported by Horn Enterprises for the year 1967 for a purchaser by the name of Geiger on Job 14?

A 610 dollars.

Q How much did the corporate records reveal as the purchase price it received on the house?

A $24,094.83.

Q Do you know what the closing statement reflected as the purchase price for that house?

I show you 33B in evidence, which is a closing statement.

Can you tell us what the purchase price was?

A $22,490.

Q And the corporation picked up 24,094.53 --

THE COURT : May I see that?

MR. BENDER: Should I stop, your Honor? Withdraw the question.

(Shown to Court.)

THE COURT: Go ahead, Mr. Bender.

Mazzella-cross

MR. BENDER: Anything wrong, your Honor?

THE COURT: Go ahead.

You stated that the purchaser picked up and the seller picked up --

MR. BENDER: According to what he says the seller, Horn Enterprises, reported as income on that house 24,094.53, which is $1,054.83 -- if somebody else's mathematics is correct -- over reported, than what the closing statement showed was the purchase price.

THE COURT: Is that a question?

MR. BENDER: Yes.

THE COURT: All right, go ahead.

MR. BENDER: That's what I was trying to get at. I thought maybe --

THE COURT: I wanted you to put the question to the witness.

MR. BENDER: Okay.

Q Is that right?

A Yes.

Q Now, would you tell the Court and jury how you can tell us that $610 in extras were omitted as income when over $1,054.83 is reported as having been received from this buyer over and above the closing statement.

Mazzella-cross

A Yes, when the corporation received various funds from the bank, they received a lump sum which might cover maybe half a dozen to a dozen houses in different stages of construction.

From our examination of the records, it appeared that allegations of these various sums were made haphazardly and not according to contract prices.

I did a test check of the various reportings in this fashion, to see how they were applied --

Q Excuse me, I do not mean to interrupt you.

I am asking you a very simple question --

THE COURT: I will allow the witness to explain it. Continue.

THE WITNESS: I did a test check of the various recordings made and I had to rely on only the available closing statements of what I had.

For the year 1967 there was a net understatement of $2,399.29 --

MR. BENDER: Your Honor, I move to strike this.

THE COURT: Are you explaining how in this particular closing the corporation showed that it received more than the purchase price?

THE WITNESS: Yes.

THE COURT: I will allow it. That was your

Mazzella-cross

question.

MR. BENDER: I asked him about $610.

THE COURT: I know it.

This witness, as I understand it, is trying to explain to the jury in answer to your question it may have come from overpayments of mortgage advances or overpayments on this particular house of mortgage advances --

MR. BENDER: Is that what he is saying?

THE COURT: I do not know. Let him answer. If he doesn't answer the question, then I will strike it.

MR. BENDER: Okay.

THE WITNESS: For the year 1968 I found a net understatement of $26,796.28, which indicated to me that the reporting by the sales on the various corporations were not correct, but I saw no way that the funds that were paid to Mr. Hornberger personally, could have been included in any of the transactions.

THE COURT: I think the question Mr. Bender is asking, why you did not attribute the excess payments on this particular job to extras?

Is that about it?

Mazzella-cross

MR. BENDER: My question is;

If the books reflect that we over-reported a thousand dollars, how can he say that?

THE COURT: That's in summation.

MR. BENDER: This is cross examination.

THE COURT: Then cross examine.

BY MR. BENDER: (continuing)

Q You concede, do you not, sir, that the corporate records reflect that on this house -- I forget the name of the buyer --

MR. RYAN: Geiger.

MR. BENDER: Thank you.

Q On Geiger was overstated, according to the closing statements, by over a thousand dollars; isn't that right?

A On this house, yes.

Q How could you say that the $610 which you are claiming was additional extras is not included in that thousand dollars?

A Because it was a deposit to the corporation and this reflects deposits to the corporation -- the extras is not deposited.

Q Are you trying to tell the Court and jury merely because the check was deposited into the personal

account, it could not have been picked up in corporate income?

A No, sir.

MR. BENDER: Of course you are not.

THE WITNESS: I am sorry --

MR. RYAN: Objection.

THE COURT: Excuse me, will you please read the question and answer again? You are asking it in the negative, Mr. Bender.

(Question and answer read.)

THE COURT: What did you mean by that answer?

THE WITNESS: The question, the way he phrased it, I did not understand.

THE COURT: What did you mean by "no"?

THE WITNESS: It could not have been picked up -- could not have been picked up.

Q If it was included into the contract as extras and the advances were paid, couldn't it have been picked up in the corporate income?

A No, sir.

Q You mean the only way you could pick it up in the corporate income, according to you, if it was deposited into the corporate account?

A On the basis of the way the returns were

prepared, yes.

Q You tell me other than your assumption, how you can tell the Court and jury that where there's an over-reporting of a thousand dollars, that the $610 is not included.

MR. RYAN: Objection.

THE COURT: Sustained.

Q In any event, if there is an over-reporting of over a thousand dollars in income, when the corporation should only report a thousand dollars less, doesn't that wipe out the $610 of alleged omitted income -- even assuming you are right?

A No, sir.

Q It doesn't --

MR. RYAN: Objection.

THE COURT: Sustained, argumentative.

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Q Let's look at the same corporation, job number 96, in 1967, for a buyer by the name of Szollossi.

How much is the amount of extras that you have attributed -- should have been reported by Horn Enterprises as to that buyer?

A $670.

Q How much did the corporation pick up as income on its books for the price of that house?

A $29,305.94.

Q I show you a closing statement -- the back of which is marked -- I had better mark it for identification.

THE COURT: Has it been previously marked?

MR. BENDER: I don't know. I thought it was.

THE COURT: Try to avoid duplicate markings. Show it to Mr. Ryan.

MR. RYAN: It has not been.

MR. BENDER: May we mark it, your Honor? I am going to mark it into evidence.

THE COURT: Any objection?

MR. RYAN: No.

THE COURT: Let it be marked.

THE CLERK: So marked as defendant's exhibit S in evidence.

(So marked.)

Mazzella-cross

Q Mr. Mazzella, would you look at S in evidence That is the closing statement, is it not?

A That's correct.

Q Just so we can repeat what it is, that's the time when the bank appears and the buyer and the seller and their lawyers, and they close title and the property is conveyed to the buyer; is that right?

A Correct.

Q That lists the purchase price that the buyer pays, does it not?

A Correct.

Q How much is the purchase price there?

A $26,455.

Q According to the corporate records, the corporation picked up $29,305.94 on that purchase; isn't that right?

A That is correct.

Q On that sale.

That's $2,032.18 more -- according to the closing statement -- it received; isn't that right?

A That's correct.

Q Despite that, you claim that $670 in extras were omitted by the corporation on that house?

A That's right.

Q Are you giving us the same reason?

A That is correct.

Q That the $670 is not included in the purchase price listed for that house?

A Yes, sir.

Q How about job 18 for Horn, 1967, Mr. Kmetz or Metz? I think he testified as one of the buyers. That is job number 18, Horn Enterprises, 1967 -- am I ahead of you?

How much have you charged Horn Enterprises with having omitted as extras from this buyer?

A $2650.

MR. BENDER: May we have this marked?

THE COURT: Any objection?

MR. RYAN: No objection.

THE COURT: Let it be marked.

THE CLERK: Closing statement marked defendant's exhibit T in evidence.

(So marked.)

Q I show you T in evidence, which is a closing statement relating to the purchase of that house by Mr. Kmetz.

How much was the price for the house?

A $23,990.

Q How much was the extras?

A $2650.

Q How much did the corporation report?

A $29,883.84.

Q So according to the records, the corporation reported $5,369.36 more than it received, according to the closing statement; isn't that right?

A With respect to this sale?

Q That's the only sale we are talking about.

A Yes.

Q You don't have any other sales?

A No, sir.

Q It's this sale that you're charging the corporation with the extras, isn't it?

A Yes, sir.

Q And it is still your contention that the $2650 in extras is not included in that over-reporting of $5,369.36?

A Yes, sir.

Q Your reason again, sir?

A My reason is this :

When the corporation -- when Mr. Hornberger received funds from the building loan or down payment on contracts or from whatever the monies were deposited to --

the accounts which had expenses to pay -- the indications are that it was applied to job numbers haphazardly.

Q You are saying that he received money which unfortunately his bookkeeper, or somebody, put down as income and he paid a tax on it?

MR. RYAN: Objection.

THE COURT: Is that what you are saying?

THE WITNESS: No, sir.

Q You are saying the difference of 5,000 -- withdrawn.

Isn't it clear from what you said that on this sale, this corporation paid tax on 5,000 more for this house than it should have?

A No, sir.

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Mazzella-cross/Bender

Q But didn't the corporation pick these amounts up and report them as income on the return, which is on the books?

A Yes. But the tax is determined by the sum total reported, not by the individual sale.

Q But the sum total which is listed in your schedule as the sale to the corporate books and from which entry the tax returns were prepared, shows that there's 5,000 more in income reported on this sale than the corporation received; isn't that right?

A Yes, sir.

Q And they paid a tax on that; didn't they?

A I do not know.

Q Let's take Storybook Manor, from 1967.

How about Mr. Booth, job number 107?

Your Honor, I can stop whenever you want.

THE COURT: I know that.

How much longer can you go?

MR. BENDER: Oh, I've got some more, Judge. I'm not trying to do this so I can stay all night. There is more, Judge. I think we -- if we can rest now, I think we can all use a rest, particularly the jury.

THE COURT: All right. We will suspend at this

time. We will continue the case at 10 o'clock tomorrow morning.

Again I ask you to come in the usual time, 20 of 10 or a quarter of 10, register first downstairs, come up to the jury room adjoining the courtroom.

I hope to start promptly at 10 o'clock.

Do not talk about the case.

The jury is excused.

(The following occurred in the absence of the jury:)

THE COURT: When can I get my requests to charge? I'm quitting a lot earlier than you feared.

MR. BENDER: Did you ever try to have a secretary around?

THE COURT: Well, I've heard some of the problems and even we have them at times.

MR. BENDER: I may do this, your Honor, if it's agreeable to you:

I may write them out in longhand.

THE COURT: If you want to write them out, I'll take them that way.

MR. BENDER: Could I do it that way?

THE COURT: Sure. I just want to get them. I'm interested in substance, not form.

Mazzella

Is this your last witness, Mr. Ryan?

MR. RYAN: No. I just have Mr. Vilardi on the tax computations.

THE COURT: All right.

MR. RYAN: I'll rest after that.

THE COURT: All right.

(Whereupon, a recess was taken until June 27, 1974 at 10 o'clock A.M.)

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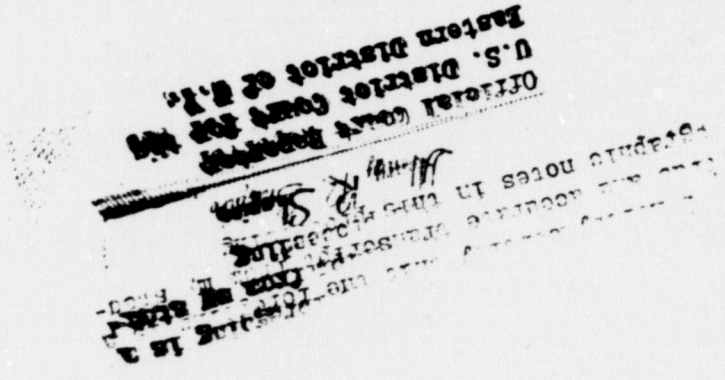

THE CLERK: Case on trial, United States of America versus Elmer E. Hornberger.

Eight extra schedules, marked Government's Exhibit 145 for identification.

THE COURT: Good morning, ladies and gentlemen. I think we are ready to proceed.

G E O R G E M A Z Z E L L A, resumes the stand and testifies further as follows:

CROSS EXAMINATION

BY MR. BENDER (Continued):

Q Mr. Mazzella, do you have the schedules before you which were Mr. Vilardi's schedules which you had referred to in your testimony yesterday?

A No, I do not.

MR. RYAN: Let me hand the witness Exhibit 115.

(Document handed to witness.)

Q I am talking about 115 D to I for identification and I believe they are all here. Now, we left off last night with your testimony with regards to the buyer Kmetz. Do you remember that?

A No, I don't recall.

Q You recall that you told us that according to the schedules this purchaser had paid $2,650.00 in extras, which you claim was omitted from the tax return of Horn Enterprises for 1967. Remember that?

A That is correct, yes.

Q And you indicated that the closing statement and the amount of money listed on the Dottal (phonetics) reflected on that sale of the house -- the books overstated the purchase price by some $5,000.00. Do you recall that?

A Yes, I do.

Q Now, I would like to ask you if you would go to Story Book Manor, which I believe is 115-H for identification for the year 1967 and look at the purchase Booth, job No. 107. Have you that before you?

A Yes, I do.

Q How much omitted extra money are you claiming the corporation should have reported?

A $1,300.00.

MR. BENDER: All right, Mr. Ryan?

I will offer this into evidence.

MR. RYAN: No objection.

MR. BENDER. This is the closing statement.

THE COURT: Let it be marked.

MR. BENDER: You think that has been marked?

MR. RYAN: I don't believe so.

THE CLERK: Closing statement marked Defendant's Exhibit U in evidence.

Q Mr. Mazzella, I show you Defendant's U in evidence, which is the closing statement of Malcolm W. Booth

and Oga Booth, his wife, and Story Book Manor, Inc.

What's the purchase price as listed in the closing statement?

A $26,990.00.

Q How much was the amount of money listed on the corporate books of Story Book Manor as having been received on the sale of that house?

A $30,210.76.

Q That's an overstatement of some $2,600.00; is that right?

A That's correct.

Q Do you know whether the $2,600.00 which is overstated includes the $1,300.00 of additional extras which you are claiming?

A It does not include that.

Q Would you point to any exhibit in the record on the basis of which you testified, which indicates any support for your statement.

A There is no particular exhibit.

Q Is this a hunch of yours?

A No.

Q Speculation of yours?

A No, sir.

Q Let us go to Story Book Homes for a minute, for

the year 1967.

I do not know if you have a schedule there, because according to my notes, Mr. Vilardi did not identify any schedule relating to Story Book Homes; is that correct?

A I cannot answer that at this time.

Q The analysis sheet, however -- withdrawn.

The schedule I think which you identified yesterday, which I think was marked 145 for identification, which you indicated was a schedule listing the buyers for each corporation and the alleged omitted extras -- do you remember that?

A I believe I do.

Q Do you have that in front of you?

A I don't have the particular exhibit. I have my own work papers here.

May I see it?

MR. BENDER: Is that in evidence?

MR. RYAN: That's one we'd like to offer in evidence at this time.

MR. BENDER: Could we use it for identification for the moment?

MR. RYAN: Surely, 145.

MR. BENDER: 145 for identification.

(Exhibit shown to witness.)

Q Would you look at the buyer bush, job No. 9S7 for 1967.

Will you withdraw that for the moment -- may I withdraw my question on that?

Go to 1968 on Homes, to the buyer Kusco, 9S17.

Do you have it?

A Not yet.

(Pause.)

Q 9S17.

A Yes, I have it.

Q How much are the extras that you are charging were omitted from Story Book Homes.

A This is Kusco?

Q Yes.

A $1,055.00.

MR. BENDER: Mr. Ryan, I wish to offer this into evidence as the closing statement.

(Document shown to counsel.)

MR. RYAN: No objection.

THE COURT: Let it be marked.

THE CLERK: Closing statement marked Defendant's Exhibit V in evidence.

Q V in evidence is the closing statement of Kusco. How much was the purchase price of the property as listed in

the closing statement?

A I don't see Kusco's name on this.

Q That is correct.

MR. BENDER: Mark this for identification. That was given to me by the Government together with the contract and I think if you compare the contract with the --

THE COURT. I do not want any discussion and advice. You may assume for these purposes that that is the closing statement.

You concede it is, Mr. Ryan?

MR. RYAN: Do you have any doubt about it?

THE COURT: Do you concede it?

MR. RYAN: We have no reason not to.

THE COURT: Assume then it is the closing statement.

MR. BENDER: I would give him the contract.

THE COURT: Give him everything, but he is the one that has to decide.

MR. BENDER: Surely.

THE COURT: He will have to take time out to determine whether this closing statement is with reference to that contract.

MR. BENDER: I can ask him if he examined it.

THE CLERK: Contract marked Defendant's Exhibit V-1 in evidence.

Q I hand you V-1, which is the contract --

THE COURT: Objection sustained.

MR. BENDER: I am sorry.

THE COURT: Look at the contract and look at the closing statement.

Anything in that that identifies the closing statement with reference to the contract?

MR. BENDER: After he answers your question, can I ask a question?

THE WITNESS: I don't see anything which relates to the two here.

THE COURT: Then assume that is the Kusco closing figures, please.

Q The purchase price -- is the amount of the purchase price -- withdrawn.

Is the amount of the purchase price the same -- the identical amount in the closing statement as it appears in that contract before you, Exhibit V for identification?

A Yes, it is -- yes, it is.

Q All right. How much was the price listed on the closing statment?

A The purchase price?

Q Please.

A $22,490.00.

Q How much was the price listed on the corporate books as having been received?

A $25,149.11.

Q Approximately $1,940.00 over-reported; is that right?

A That is correct.

Q Do you know whether the $1,085.00 that you are claiming as an extra which was omitted from the corporation -- how much is it -- $1,000.00 --

A And $55.00.

Q Was included in the over-reporting amount?

A No, sir, it wasn't included.

Q Would you say that the amount or the excess which is listed as having been received from Kusco -- in excess of some $1,900.00 -- is sufficient to wipe out any claim of $1,055.00 in omitted extras, assuming that they were omitted?

A No, sir.

Q They paid a tax, did they not, on the additional over-reporting of $1,900.00?

MR. RYAN: Objection.

THE COURT: Overruled. I will allow that to be answered.

Mazzella-cross

A No, sir.

Q Didn't they report the amount which appears on these books as having been received of $25,149.11?

A I cannot answer that in the framework of your question.

Q Did you change your mind since yesterday --

THE COURT: Objection sustained.

Q You heard Mr. Vilardi's testimony, did you not, that he listed the price on those schedules which he obtained from the corporate records; is that right?

A That is correct.

Q And it is clear, is it not, that the income that is picked up on the corporate books as being the amount that they received -- the corporation received, was what he reported on the tax return; is that right?

A That is correct.

Q So are you saying he didn't pay a tax on $25,000.00?

A I cannot answer that in the framework of that question.

THE COURT: In your opinion, did the corporation report the income from the Kusco purchase as $25,000.00 some odd dollars -- did they do that?

THE WITNESS: The income from Kusco was included in the schedule in that amount .

THE COURT: All right, that's all that Mr. Bender is asking.

Whether they paid a tax on that amount is a conclusion.

Q You don't make any contention, do you, that the $25,000.00 paid by Mr. Kusco was not reported on the tax return of Story Book Homes, yes or no?

A I cannot answer that question in that framework.

Q Do you make any contention in this case that the $25,000.00 listed on the corporate books as having been received from Kusco, the purchaser of that house, was not reported on the corporate return -- yes or no, sir? Do you make such a contention?

THE COURT: Can you answer it yes or no?

THE WITNESS: Would you repeat the question.

(Question read.)

THE WITNESS: That amount was not received from Kusco.

MR. BENDER: I move to strike that as unresponsive.

THE COURT: Strike it out.

If you cannot answer the question yes or no, say you cannot answer it yes or no.

THE WITNESS: I cannot answer that question yes or no.

Q As we understand it, the only claim you are making in this case is that extras paid to Mr. Hornberger were not reported by the corporation; isn't that right?

A That is correct.

Q That's the only claim you are making; is that right?

A That's right.

Q Mr. Mazzella, did you look at your -- excuse me.

Would you look at the Vilardi schedules relating to Dottal (phonetics) which is 115-F.

Do you find the purchaser Bahrenburg, 10-F - S -- do you find it?

A What's the name?

Q Bahrenburg -- excuse me, I withdraw that. It looks as if I have the wrong one. I am sorry.

(Pause.)

Would you stay with Dottal (phonetics) if you will.

You have Dottal (phonetics) for 1968 in front of you -- do you have the exhibit No. 115-G for identification?

Do you have the buyer Vilano (phonetics)?

A Yes, I do.

Q Mr. Vilardi has listed that sale under what corporation?

A Dotal.

Q How much are the extras alleged to have been omitted?

A $3,605.00.

(Continued on next page.)

Mazzella-cross

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Q I show you 23A in evidence, which is the closing statement. The seller is Dotal Building Corporation and the buyers are Raymond Romano and Renee Romano.

How much is the purchase price that the buyers indicate they paid for the sale of the house on the closing statement?

A $27,251.62.

Q And how much is reflected on the books of Dotal Corporation as the amount of that purchase price?

A $31,144.70.

Q That is an overstatement of $3,839 -- no, I withdraw that -- $3,893.08, if my mathematics is correct?

A Yes.

Q You are claiming how much is omitted, $3,605?

A Thirty-six hundred and five dollars.

Q He is entitled to a refund then of $288 --

A No sir.

Q -- (continuing) -- even assuming he didn't pick up the extras of $3,600?

A No sir.

Q Would you go to --

MR. BENDER: I will take one or two more.

THE COURT: Take as long as you want, Mr. Bender.

Q Would you look at Mr. Vilardi's working papers

for -- that is 115E, for identification -- which is Horn Enterprises, 1968.

(Mr. Bender hands document to Mr. Ryan.)

(Mr. Ryan returns document to Mr. Bender.)

MR. BENDER: I am going to offer in evidence the closing statement.

MR. RYAN: To the Hughes transaction?

MR. BENDER: Yes.

MR. RYAN: No objection.

THE COURT: Let it be marked.

THE CLERK: Closing statement marked Defendant's Exhibit W in evidence.

(Document referred to being the closing statement was received and marked Defendant's Exhibit W in evidence.)

MR. BENDER: It has not been marked before.

BY MR. BENDER:

Q I show you the statement, closing title, as it is so headed, W in evidence, Horn Enterprises being the seller and the buyer is Richard and Sandra Hughes.

How much is the purchase price as reflected in that closing of title?

A $23,745.11.

Q And how much is the purchase price as reflected

on the books and records?

A I have not found that schedule yet.

Q Would you look at --

A Oh, I find it now.

Q You have got it?

A Yes, $26,170.11.

Q That is an over-reporting of $2,425, is that right?

A Correct.

Q The extras that you are charging the Horn Corporation is a thousand and thirty dollars?

A That is correct.

Q And it is still your testimony, is it not, that you know that the thousand and thirty was not included in the purchase price listed on the books and records of the corporation?

A That is correct.

Q Now, can I take you back to Dotal in 1968, and I believe that is 115G, and I had asked you before about it, and actually the name is Bahrenburg.

You have that in your schedule?

A Yes I do.

Q To whom is the omitted extras -- to what corporation are the omitted extras attributed to?

A To Dotal Builders.

Q And what is the basis for your opinion that the extras that the Government alleges were omitted here should have been reported by Dotal and not some of the other corporations?

A Dotal Building reported the sale of the house, so it is our contention that Dotal Building should have reported the sale of the extras.

Q Did you check the closing title on this house?

A Yes I did.

Q And did you check the contract on this house?

A Yes I did.

Q And did you check the bond and mortgage record of the Roosevelt Savings Bank which is included in Government's Exhibit 142 in evidence?

A I believe I did.

Q Did you review the correspondence between Mr. and Mrs. Bahrenburg and the corporation relating to the extras?

A Yes I did.

Q Isn't it a fact that the contract of sale, the closing title, the bond and mortgage records, and the correspondence on the extras all indicate that this was a sale by Elpa Builders and not by Dotal?

A That is correct.

Q While I am on Bahrenburg, I think this is all in evidence as 22, so would you agree with me that the purchase price of the house on Bahrenburg is twenty-four thousand, five hundred?

A The original purchase price is listed as twenty-four thousand, five hundred.

Q I am not talking about the few adjustments here. I am talking about the purchase price. Am I right?

A That is correct.

Q Because you have adjustments of $48,36,78,which is for insurance, and water, and oil which you adjust; you know that, don't you?

A I understand that.

Q Now, how much was picked up on the corporate books as being the purchase price of that house?

A $26,703.

Q Now, that is a difference of some fourteen hundred forty-five dollars, is that right?

A That is correct.

Q And you claim, do you not, that eighteen hundred and ten dollars was omitted extras?

A Yes I do.

Q That should have been reported by the Dotal

Corporation?

A That is correct.

Q So that to the extent that the corporation over-reported the sale by some fourteen hundred and forty-five dollars, that would reduce the claim of omitted extras of eighteen hundred and ten dollars by some fourteen hundred and forty-five dollars, wouldn't it?

A No sir.

Q You still say that the eighteen hundred dollars would still be omitted increment that should have been reported?

A Yes sir.

Q Now, Mr. Mazzella, when I showed the Bahrenburg situation and indicated -- you indicated that all of the documents seem to indicate that that sale was made by Elpa Builders, not by Dotal, do you tell the Court and Jury that actually you are just relying solely on what Mr. Vilardi did?

A No sir.

Q Well, I gave you the Dotal Building Corporation's books --

THE COURT: Objection sustained. Argumentative.

MR. BENDER: I am sorry.

THE COURT: Argumentative.

MR. BENDER: I withdraw it, your Honor.

Q Are you relying on anything else?

A Yes sir.

Q Than the Vilardi schedules?

A Yes sir.

Q Well, tell us.

A In addition to Vilardi schedules, I am relying on expert opinion from individuals in the Internal Revenue Service.

MR. BENDER: Oh, I object to that.

THE COURT: Strike it out.

Q Mr. Mazzella, you are a Special Agent of the Intelligence Division, are you not?

A Yes.

Q You are supposed to be an expert? Isn't that right?

A That is correct.

Q Or aren't you sure now?

MR. RYAN: Objection.

THE COURT: Is there an objection?

MR. RYAN: Yes.

THE COURT: Overruled. I will allow it.

Do you feel that you are expert enough in this particular field to express an opinion?

THE WITNESS: Yes I do.

Q Well, when I ask you about your opinion, I am

referring to the document in evidence because that is what you based your opinion on when you testified to Mr. Ryan's questions? Do you remember?

A That is right.

THE COURT: When you are asked to express an opinion, the opinion, I assume, that you express, is your opinion and not some other expert who is not subject to cross-examination.

THE WITNESS: Yes, I understand.

THE COURT: Is that right?

THE WITNESS: That is right.

MR. BENDER: Of course.

BY MR. BENDER:

Q So when I asked you in rendering your opinion are you relying upon anything other than Mr. Vilardi's schedules, I am referring to a document in evidence.

A No other documents.

Q So then to the extent that Mr. Vilardi incorrectly reflected this sale as being a sale -- I am talking about Bahrenburg -- incorrectly reflected the sale as belonging to Dotal instead of Elpa, your opinion would necessarily be affected by it, would it not?

A I cannot answer that question in that framework.

THE COURT: No. Mr. Bender is saying that

assume that Mr. Vilardi was wrong in excluding the extras on the particular contracts as part of Dotal's income, and you relied on Mr. Vilardi's findings that it was a part of Dotal's income, would your opinion change?

Do I fairly present the question, Mr. Bender? I am trying to express it in language that the witness might understand.

MR. BENDER: I apologize. I didn't hear it.

THE COURT: Will you please repeat it.

MR. BENDER: I didn't hear it. But I am sure it is all right.

THE COURT: Well, I am not so sure. Will you please read it?

(Record read.)

(continued on next page)

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

vs.

ELMER E. HORNBERGER,

Appellant.

On Appeal from Judgment of Conviction, 26 U.S.C. §§7201 and 7206(1); E. D. N. Y., Before Mishler, J. and a Jury

APPENDIX TO APPELLANT'S BRIEF

[Volume II—Pages 585a to 1166a]

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UNITED STATES COURT OF APPEALS
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DEC 4 1974

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THE COURT: Is that the substance of the question?

MR. BENDER: No, no.

THE COURT: So there you are.

MR. BENDER: Excuse me. What I asked him was if it should appear that from the documents I am showing Mr. Mazzella that actually the seller was Elpa on Bahrenburg and not Dotal, would that fact make him change his opinion?

MR. RYAN: Objection to that in form.

THE COURT: Sustained as to form.

MR. BENDER: All right. I will put it another way.

BY MR. BENDER:

Q To the extent that it appears --

MR. BENDER: I withdraw that.

Q Assuming that Mr. Vilardi is in error --

THE COURT: Mr. Bender, I am going to ask my question then. I am getting to like it more and more.

Please repeat it and ask the witness that question. It might cut through here.

MR. BENDER: OK. I know I shouldn't have tried it.

(Record re-read.)

MR. BENDER: I didn't hear the word "wrong". I apologize.

THE WITNESS: I cannot answer that in the framework of that question.

THE COURT: All right, next question.

BY MR. BENDER:

Q Could you answer it in this way, certainly the indicia -- you as an expert -- certainly the indicia of who is the seller of the house or the owner of the house and at the same breath, the one to whom the extras should be charged to, would be reflected in the closing title, in the bond and mortage record, in the contract, in the correspondence between the corporation and the buyer for the extras?

A That should have been the basis for that.

Q All right. So normally, normally you as an expert, seeing the indicia -- forgetting about Mr. Vilardi -- wouldn't you say now that the seller is Elpa Builders?

A It should have been, yes.

Q Isn't that right?

A Yes.

MR. BENDER: Excuse me a moment, your Honor.

(Mr. Bender examines documents.)

Q Would you refer in your Exhibit 145 for identification to a buyer by the name of Moor? I think it is

job number 215 in your schedule. And the schedule is Story Book Homes for 1968. Have you found that?

A I have found it.

Q That was attributed -- there are extras attributed here of some twenty-four hundred dollars? Right?

A That is correct.

Q And that is attributed or allocated to Story Book Homes, Incorporated for 1968?

A That is correct.

Q Did you look at the deed at the County Clerk's office when you searched the title?

A I personally did not look at it.

Q Well, it was done under your supervision, was it not?

A Yes it was.

Q Well, would you check that to see.

A Yes, it was checked.

Q And who conveyed the deed to Mr. and Mrs. Peter Moor?

A Elpa Builders.

Q Elpa Builders?

A Yes.

Q These extras have been attributed to Story Book Homes, is that right, for1968?

A That is correct.

Q Did you check the bond and mortgage record?

A Yes sir.

Q And the owner is listed as Elpa Builders?

A Yes.

Q Is that true of the contract, if you know?

A I did not see the contract.

Q I am looking at Exhibit 88 in evidence. I thought it had the contract, but it doesn't have the contract.

Now, this is an interesting one because included in Exhibit 88 --

THE COURT: Strike out "now, this is an interesting one."

MR. BENDER: I am sorry. I withdraw that.

I withdraw that, your Honor. I won't go further on this one. That is all I mean by that.

Q I just have one more of these I would like to go in to with you.

Would you look at Story Book Manor? Would you look at Mr. Vilardi's records on Story Book Manor? And that is, Story Book Manor for 1968, and that is your 115I for identification with a buyer by the name of Baitz.

Do you have that in front of you?

A Not yet.

Mazzella-cross

Q Do you have it?

A Not everything that I need.

Q If it is easier for you, look at 145 for identification which is a schedule you say you prepared for Mr. Vilardi's records as well as other records in evidence.

A I believe I have what I need now.

Q Do you have it?

A Yes.

Q Now, how much extras are you claiming were omitted on Story Book Manor in 1968?

A Six hundred and sixteen dollars.

(Mr. Bender exhibits document to Mr. Ryan.)

MR. RYAN: No objection.

MR. BENDER: I offer it in evidence as the statement of closing title.

DEPUTY CLERK: Closing statement marked Defendant's Exhibit X in evidence.

(Document referred to is received and marked Defendants Exhibit X in evidence.)

(continued on next page)

Mazzella-cross

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Q I show you X in evidence, which is a statement of the closing, the seller being Story Book Manor and the purchasers being Michael and Shirley Bates, as listed thereon.

How much is the purchase price as listed in the contract -- in the closing statement?

A $23,990.00.

Q How much did the books and records of Story Book Manor for 1968 reflect as having been received from that buyer?

A $26,737.75.

Q An overstatement of some $2,000.00; is that right?

A That's correct.

Q How much is the extras that you claim?

A $616.00.

MR. BENDER: I have no further questions.

REDIRECT EXAMINATION

BY MR. RYAN:

Q In connection with your comparison between closing statement and the corporate records, you told us on several occasions that the corporate records reflected more money than were on the closing statement for that particular sale, correct?

A Correct.

Q And any one of the 93 transactions, did you find that the corporate records stated less than what was on the closing statement?

A Yes, I did.

Q In how many instances, approximately, did you find those understatements?

A Twenty-nine.

Q Twenty-nine --

A Separate sales.

Q And did you add up the amount of all the closing statements and the amount of all the sales shown in the corporate records to make a comparison?

A Yes.

Q What was the result of that?

A The net result was for the year 1967, there was an understatement of income of $2,399.92.

For the year 1968, there was a net understatement of $26,796.68.

THE COURT: You are saying that was in addition to what you say was understatements due to the failure to report extras?

THE WITNESS: That is correct.

Q Separate matter?

A Separate matter.

Q Okay.

I would like to direct your attention to the meeting you had with Mr. Hornberger and Mr. Canale on September 14, 1972.

You were asked yesterday about that meeting. Do you recall that?

A Yes, I do.

Q With respect to those extra payments involved in this case, you testified yesterday you had some indication of extras at the meeting of September 14, 1972?

A Yes, I did.

Q To what extent did you have an indication that extra payments were made by buyers personally to Mr. Hornberger?

A I had photocopies of checks from three home owners where they had paid Mr. Elmer Hornberger personally for extras.

Q Would you tell us the conversation you had with Mr. Hornberger about those checks?

A I don't know if I had identified the homeowner to Mr. Hornberger, but I did indicate to him that I had some evidence that checks on extras were paid to him personally.

Q And did he give you any response?

A Yes, he did.

Q Now, you are looking at the report of interview.

Without looking at the report of interview, tell us to your best recollection, as to what response he gave you to that particular inquiry.

A He said that only in a few instances he had directed customers to pay him directly on the extras and that so he did this only a short while and that the money received on the extras was reported on his tax returns.

MR. RYAN: Thank you. No further questions.

MR. BENDER: Could you repeat the last answer?

THE COURT: Mr. Shapiro.

(Answer read.)

RECROSS EXAMINATION

BY MR. BENDER:

Q Do you have that memorandum up there?

A Yes, I have a copy.

MR. BENDER: May I see it?

MR. RYAN: I do not have it at the table.

MR. BENDER: Excuse me a minute. I am trying to find a copy of that memorandum.

(Pause.)

MR. RYAN: I have another one.

MR. BENDER: I have it now. Thank you.

Q I think we established yesterday, did we not, that your statement that you had asked Mr. Hornberger about

the extras and that he did not volunteer it to you was not reflected in your memorandum of September 14th?

A That's correct.

Q Now, why don't you tell the Court and jury the mechanics you followed in preparing your memo of the interview of September 14, 1972.

A I made notations down on some sheets of paper.

THE COURT: At the conference?

THE WITNESS: Right, at the conference while he was speaking.

Q All right, you put them on a piece of paper.

Then what did you do after you left the conference -- withdrawn.

I take it that you noted on your sheets of paper whatever you felt was very significant in connection with your investigation; isn't that right?

A That's correct.

Q You left the interview and did you go right back to your office and dictate from your notes or did you wait a while or when did you do it?

A I would have to look at my activity sheets to be able to tell that.

May I see a copy?

MR. RYAN: I hand the witness Exhibit 136.

MR. BENDER: For identification.

MR. RYAN: Correct.

(Document shown to witness.)

THE WITNESS: I prepared a memorandum of that interview on the following day, based on the notations made during the interview.

Q That would be September 15th?

A Correct.

Q When you prepared it, the interview was fresh in your mind?

A Yes, sir.

Q And in addition to which you had your notes?

A Yes, sir.

Q Was there anything in your notes which indicated that you had asked Mr. Hornberger about the extras?

A Yes.

Q You had it in your notes?

A Yes.

Q Where are your notes?

A I don't have those notes any more.

THE COURT: Mr. Bender is referring to your original notes. Was there anything in those notes that indicated that you first asked --

THE WITNESS: Yes.

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Q Where are the notes?

A I don't have them today.

Q You mean you destroyed them?

A Correct.

Q Didn't you think that was significant that you said to him, "I have evidence that you have received checks which you put into your personal bank account for extras," didn't you think that was significant?

A Yes, sir.

Q Didn't you think that -- withdrawn.

Didn't you think this bit significant enough to put it into your typewritten report?

A In the manner that I prepared my memoranda, I knew that I had asked him that question.

Q This is from your memory today; is that right?

A It has been my procedure in that fashion --

Q I see, it is not from your recollection, it is just a matter --

A It is from my recollection.

Q You said it is your procedure?

A Yes.

Q You mean as a matter of procedure --- routinely you would ask that kind of a question?

A Yes.

Mazzella-recross

Q Actually, except for the fact that you were following what you thought was a routine procedure, you do not have any specific recollection that you asked him that specific question?

A Incorrect. I do have a recollection.

Q You do?

A Yes, sir.

Q But it's clear it is not in your memorandum?

A It is not worded in that fashion.

Q And this was a memorandum that went to your superiors?

A Correct.

Q Reported and important conversation with the taxpayer; is that correct?

A Yes.

Q Is one of the reports that you based the recommendation for criminal prosecution in this case?

A Correct.

Q You were the agent who recommended criminal prosecution, correct.

A Correct.

Q I think you said -- now, did you say to Mr. Ryan that you actually said to Mr. Hornberger, "I have some checks from some buyers?"

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Mazzella-recross

A Yes.

Q Did you tell us that yesterday?

A I don't recall.

Q Didn't you just say to us yesterday that all you did was -- that you asked him the question about the extras?

A I don't recall that particular comment.

MR. BENDER: On page 517 of the record.

"In your conversation with Mr. Hornberger, did Mr. Hornberger tell you that he had extras _- did he volunteer to you that he had extras which he had received in the form of checks from buyers which he put into his own personal account?

"A He did not volunteer this information. I questioned him about it.

"Q You didn't know anything about it?

"A I had some indication.

"Q I asked you before you hadn't talked to any of the buyers _- didn't I ask you that?

"A Correct."

Q You indicated yesterday that you hadn't talked to any of the buyers; is that right?

A That is correct.

Q Now you are telling us that you got three checks from the buyers?

A That is correct.

Q Which is correct --

MR. RYAN: Objection.

THE COURT: Sustained. Sustained as to form.

Q Well, was what you told us yesterday correct or what you are telling us today?

MR. RYAN: Objection.

THE COURT: Sustained.

Q Did you have three checks from buyers at the time you spoke to him on September 14, 1972?

A Yes, sir.

THE COURT: At the time you had those checks, had you talked to any of the purchasers?

THE WITNESS: No, sir.

THE COURT: I thought you might have left it out, Mr. Bender.

MR. BENDER: I appreciate your help, your Honor.

THE COURT: It is all right.

(Continued on next page.)

Q So, then, what you told us yesterday --

"Q I asked you before, you hadn't talked to any of the buyers -- didn't I ask you that?

"A Yes."

You meant you hadn't talked to the buyers, but somebody gave you the checks?

A Yes.

MR. BENDER: Page 518:

"Q You didn't have any information really about extras you told us; is that right?

"Mr. Ryan: Objection, that wasn't the answer.

"The Witness: No."

I will read it over: "And you didn't have any information about extras you told us; is that right?

"The Witness: No."

That's an ambiguous question and deserved an ambiguous answer.

"Q You asked him questions about the extras?

"A That's correct."

Then further down.

"You had asked him what questions.

"A About the questions on extras.

"Q You asked him about the extras?

"A Yes."

Q Did you tell us yesterday that you had three checks from buyers?

A You didn't ask me.

Q You said he didn't volunteer it, didn't you?

A Would you repeat the question?

Q In any event, -what is clear is whether you did ask him or he volunteered, the point is he did tell you, did he not, according to your memorandum that he had directed buyers to make payments of the extras to him personally, didn't he?

A Yes.

Q Now, you said to Mr. Ryan that he told you he only told them -- that his buyers -- in a few instances; is that right?

A Yes, sir.

Q In other words, you are saying now that Mr. Hornberger told you when he told you, "I did instruct buyers to make the checks payable to me" that he said to you that he only did that in a few instances?

A Yes.

Q It's certainly clear from the evidence here in 1967, 1968 -- in some 93 instances -- Mr. Hornberger had directed payments; isn't that right?

A Yes, sir.

Q As a matter of fact, Mr. Hornberger had so

stipulated that he did?

A Yes, sir.

Q And you're saying he told you now only in a few instances?

A Yes, sir.

Q Did you state that in your memoranda?

A Yes.

Q You did -- you did?

A May I read it from my memoranda?

Q I am asking you a question --

THE COURT: It has already been answered, Mr. Bender.

MR. BENDER: He said, "Yes?"

THE COURT: Yes.

Q Didn't you say in your memoranda he said -- Mr. HOrnberger -- that the reason why he directed various customers to make checks payable to him personally was to make certain that he could pursue the maker personally when the checks were returned to the bank?

A Yes, sir.

Q Is that correct, did he say that to you?

A Yes, sir.

Q Then did he say in this fashion the maker could not withhold payment because of counter-claims against the

various corporations; is that right?

A Yes, sir.

Q Then he said -- is that what he said to you?

A In substance, yes.

Q It's what you got in your memo?

A Yes, in substance.

Q You are following along with me?

A Yes.

Q Then he said he followed this procedure for only a short while; is that right?

A Yes.

Q Then what did he say -- whatever income was made from these transactions were picked up on the corporate books; is that what he said?

A Yes, sir.

Q Now, you just told Mr. Ryan that Mr. Hornberger said that the extras that he received, he picked up on his own individual return; isn't that what you just told Mr. Ryan before?

A I don't know which statement you are referring to.

Q A moment ago, didn't you testify when Mr. Ryan asked you, that Mr. Hornberger picked up the extra payments on his own individual return -- meaning a distinction between

his own individual returns and the corporate returns -- did you?

A I would rely on my memorandum statement here.

Q You certainly would.

And you would rely upon what is written there and not what's not written there; is that right?

A Yes, sir.

Q And certainly in your memorandum you do indicate that Mr. Hornberger told you that the income from these transactions, meaning the extra payments, were picked up on the corporate books; isn't that right?

A Yes, sir.

Q And so what you have told Mr. Ryan here, when Mr. Hornberger said to you -- according to your memorandum -- that he followed this procedure for only a short while, you interpreted that to mean he said to you in only a few instances; is that right?

A Would you repeat that?

I was referring to something here.

THE COURT: Mr. Shapiro.

(Question read.)

THE WITNESS: Yes, sir.

Q You didn't actually tell us that yesterday.

A I don't recollect without seeing what I said yesterday.

Mazzella-recross

Q You still think you told us that today --

MR. RYAN: Objection.

A I don't know what statement you are referring to.

MR. RYAN: Objection.

THE COURT: I will allow it to stand.

Q Did you tell it to us yesterday?

A I don't recall which statement you are referring to yesterday.

Q Mr. Mazzella, you are telling us from memory over two and a half years ago, that you had a conversation with Mr. Hornberger -- that you don't have in your memo -- that you did remember the next day --

MR. RYAN: Objection.

THE COURT: I will allow it.

Q Is that right?

A What's the question?

THE COURT: Mr. Shapiro.

(Question read.)

Q Isn't that right?

A Your question still relating to what you said is not -- I am not sure of exactly what you are referring to.

Q Let's relate it to the fact that you had three checks which you told him that you had from buyers; is that right?

A Right.

Q Now, I asked you about a conversation yesterday -- right here in this courtroom -- and you say you don't remember?

A What are you referring to about yesterday's conversation?

Q Did you tell us yesterday that after Mr. Hornberger told you that he had told the buyers of these extras to make the checks payable to him -- did you tell us that he said, "That's right but only in a few instances?"

A Yes, that's correct.

Q You told us that yesterday?

A Yes, I believe I did.

Q I show you the transcript of yesterday proceeding starting with 517 where I began cross examination on the extras, including 518, 519, 520, 521, 522, 523, 524 -- and some of this has to do with the theory that he had in mind when he said he put the checks in his own account --

THE COURT: Strike that out. Disregard Mr. Bender's statement. The jury will decide what the answer to questions mean.

MR. BENDER: All right.

Q You look through those pages and tell us where --

A Where what?

Q Where in that transcript of my cross examination of you or even in the direct examination that you had with Mr. Ryan you said that he told you that he only told buyers to make out checks to him in a few instances.

THE COURT: Are you asking this witness to examine about two or three hours of testimony?

MR. BENDER: It is short, your Honor.

THE COURT: We will take a recess and do the

b best you can. You can go through the transcript and see if you can answer Mr. Bender's question.

(Recess taken.)

(Continued on next page.)

(After recess)

(The following occurred in the absence of the jury.)

MR. BENDER: Have you read it all?

THE WITNESS: I believe I got most of it.

THE COURT: I'm not going to take any more time. He will do the best he can.

(The jury thereupon returned to the courtroom at 11:45 o'clock A.M.)

G E O R G E M A Z Z E L L A, called as a witness, having previously been duly sworn, resumed the stand and testified further as follows:

RECROSS EXAMINATION

BY MR. BENDER:

Q Mr. Mazzella, did you have enough time to look at those pages?

A I had reviewed most of it.

Q Are you in a position to tell the court and jury now that you did tell us all here yesterday that Mr. Hornberger when he spoke to you on September 13th told you that he only told buyers to make the checks payable to him in a few instances?

A I didn't find that statement.

Q Now, having reviewed that, is it clear in your mind now that you didn't tell us that yesterday?

A I would go by that statement, yes.

Q You would go by what statement?

A That I haven't found it, right.

Q Oh, is it clear to you now that having looked at the transcript that you did not tell us that yesterday?

A Yes, sir.

Q Now, you told the Court and jury that you had an opportunity to examine and compare some closing statements with the records of the purchase price reflected on the corporate books and a number of instances other than what I asked you about.

A Yes, sir.

Q And you came up, I think you said, with the fact that exclusing extras which have been charged, is that right?

A Yes, sir.

Q There was a difference,that is an understatement in 1967, referring to all corporations.

A Yes.

Q Of some $2,300.00? Is that right?

A Yes, sir.

Q In other words, the corporate records when you compared them in the 29 instances out of the 92, you said showed a discrepancy between the amount of the purchase price reflected on the books and the closing statement in all four

corporations of some $2,300.00.

THE COURT: The jury may be excused.

(The jury thereupon retires from the courtroom.)

(The following occurred in the absence of the jury.)

THE COURT: Is that what you said?

Maybe you had better repeat that question.

Mr. Simon, will you repeat it. I am doing it this way for a reason, Mr. Bender.

(Record read.)

THE WITNESS: For the year 1967, there was a net understatement of approximately that amount.

THE COURT: In the corporation or just on those 29 closings?

THE WITNESS: Let me see, those 29 are the -- no, the understatements would have come to $12,583.00. I had said net. That was allowing for the overstatements.

THE COURT: I am talking about what you said, you testified to when Mr. Ryan asked the question. Did you refer to the 29 or did you refer to the total income received by the corporation?

THE WITNESS: I referred to an analysis of all of the available closing statements where we had overages and underages, in other words, where there

was over-reporting and under-reporting. The net result of that analysis was an understatement of approximately $2,300.00 for 1967.

THE COURT: Did you take the cross examination, Mr. Simon (addressing Reporter)?

THE REPORTER: No, your Honor.

THE COURT: I mean the redirect? I mean Mr. Ryan's?

THE REPORTER: No, sir, I did not.

MR. BENDER: I think I may have been mistaken.

THE COURT: My recollection is that he testified that the total income of the corporation of both tax years was understated by some $2,300.00.

MR. BENDER: No, your Honor, that is not my recollection.

THE COURT: What is the sense of talking about five statements, ten statements, 29 statements? The examination and cross examination is going into matters that bear not a wit on the issues in this case. Suppose the other 64 statements showed $50,000.00 worth of overstatement, or $50,000.00 worth of understatement, wouldn't that reflect on whether each corporation reported a substantial lower net than they received? Why talk about 29? Why talk about five?

Mr. Bender has spent hours I think now on going into one closing where they overstated.

And you are guilty of the same thing, if you are talking about 29.

MR. BENDER: Your Honor --

THE COURT: That is why I excused the jury. Because I thought you misstated the testimony. I might say I was going to refer to some matters wherein I thought that you referred to testimony of the witness and did not accurately state it. And I thought this was another instance of it and I was going to nail you for it, frankly.

MR. BENDER: Well, are you convinced I did not?

THE COURT: I'm not convinced yet. I don't know whether Mr. Ryan remembers the question.

MR. BENDER: Your Honor, can I answer most respectfully your statement that you felt my cross examination with Mr. Mazzella with respect to the overstatements was totally irrelevant -- can I answer that?

THE COURT: Surely.

MR. BENDER: This is a specific items case where the Government says there was a deficiency on the tax return of each corporation by the omission of specific

items of extras --

THE COURT: Mr. Bender, let me say this, and I do not want to cut you short, but frankly I do not want to discuss it with you because I do not want to give the Government my opinion on it. Now, I am as blunt as that. But if I say anything at all it might indicate something and I am not trying the Government's case for them. They can try it any way they want to. And answering your question might very well indicate something.

You recall the question that you asked(addressing Mr. Ryan)?

MR. RYAN: Yes I do, on redirect.

THE COURT: Yes. Were you referring to the 29?

MR. RYAN: No, I was not.

THE COURT: I thought the question referred to all the corporations. Now, that is the way I heard it.

MR. RYAN: Yes.

THE COURT: And all the income.

MR. RYAN: That is correct, to show --

THE COURT: Not the 29 even though the witness may have misunderstood. And he apparently answered according to the 29. I assume that you were asking questions from some analysis you had.

MR. RYAN: Yes, of course, the agent's analysis. He added them all up.

THE COURT: I heard the figure of 92 and 93. All the 92, 93 closings.

MR. RYAN: Yes, I think --

THE COURT: You say that the total that all the corporations reported as income for all these 92 and 93 closings was about $2,300.00 less than the closing statements said they should have reported.

MR. RYAN: I thought it was a larger figure.

THE COURT: Or $12,000.00?

THE WITNESS: I misunderstood the question then.

MR. RYAN: Stick with the 93 transactions. What is the understatement according to the comparison?

THE COURT: Well, I do not want you to go over the testimony. The only reason I broke here was because I thought the question was unfairly put. I thought the witness answered with a degree of clarity and definiteness that all the income for all the corporations was $2,300.00 less than the closing statements showed they should have been.

Now, that is why I asked to make sure that there was no mistake, that that was in addition to the understatement by reason of not reporting the extras. That

is why I remember the question. So when you talk about 29 statements I knew just what you were getting at. I thought it was an unfair way to present it.

MR. BENDER: Obviously, there is a difference of opinion.

THE COURT: Well, I don't have the reporter here now who took that. You are referring to the testimony.

MR. BENDER: The witness just told you that is what he said. But you can't agree with him.

THE COURT: Is that what you said? The answer to your question referred only to the 29 closings.

THE WITNESS: No, your Honor, I believe I explained that I had made an analysis of the available closing statements and I compared where we had overages in some instances and underages reporting on others, and I presented net figures.

THE COURT: But only on the 29 that you had seen.

THE WITNESS: No, sir. The 29 related to the understatements.

MR. BENDER: No. You said you had looked at 29 out of the 92.

THE COURT: Well, I don't understand it. I'm more confused than the witness is then. And I do not

understand what it matters if you are talking about what the corporation reported -- if it is anything less than the 92 or 93 houses that were closed, then it is a distorted figure because they might have reported under on 50 or 70 and reported over to such a figure that it may have more than covered the amount of under-reporting. So, unless we talk about all the income from the corporations we don't know what we are talking about.

MR. RYAN: That is all I am talking about.

THE COURT: You are bouncing figures over to a certain amount and under to a certain amount. We are talking about nothing.

MR. RYAN: That is all I am asking.

THE COURT: The only relationship it has to the case on hand, and that is why I say all these questions are totally irrelevant, is whether even if he cheated or attempted to cheat on the extras, if he, through some other error or mistake cancelled it out, then there wasn't a substantially --

MR. RYAN: Deficiency.

THE COURT: Understatement.

MR. BENDER: That is the point.

THE COURT: Oh, but, Mr. Bender, with all due

respect to your examination, and I know that you know exactly what you are doing, but I do not think any part of your examination intended to bring out the whole picture. You just intended to bring out one or two closings where they reported more. And I do not say you are doing anything wrong there. That is your business. That is why I don't want to say too much. As I say, I am trying not to help either one side or help the other side if I possibly can. But what I insist on is fair questions. And I thought this question was unfair. Apparently, it wasn't. I will let you explore it further.

All right, seat the jury.

(The jury thereupon returned to the courtroom at 11:55 o'clock A.M.)

(Continued on next page.)

THE COURT: Do you want to put the question again Mr. Bender?

MR. BENDER: Yes.

GEORGE MAZZELLA, called as a witness, having previously been duly Sworn, resumed the stand and testified further as follows:

RECROSS EXAMINATION

BY MR. BENDER:

Q Mr. Mazzella, I refer you now to the analysis that you gave Mr. Ryan wherein you concluded from that analysis that there eas a certain understatement for 1967 of all of the corporations of some 2300, and an understatement of 26,000 for 1968. Do you recall that?

A Yes, sir.

Q Now, was it our understanding that you had made this analysis from 29 out of the 92 sales made by the different corporations?

A The 29 sales referred to where they understated.

Q 29 sales referred to what?

A The understated sales.

Q So, in other words, the 2399 you referred to thos 29 purchases, is that right? Is that what you are sa ing?

A No, sir, not 2399, no, sir.

Q Now, then, of those 29 purchases which you had

examined, what was the understatement?

A Approximately $80,000.

Q $80,000? And that is based upon what?

A Comparing the corporate records with the closing statements.

Q And have all of those closing statements been marked in evidence?

A I don't know.

THE COURT: Well, suppose you give us the names of the 29 purchasers and job numbers.

THE WITNESS: For Dotal Building, 1968, W & J Cummings, job 24, under-reported by $4,875.

I & B Seidner, job number 2, under-reported by $1,360.

Horn Enterprises, 1967, G & C Jaffe, job number 8, under-reported by $1,350.

R & N Rafferty job number 17, under-reported by $67.

Storybook Homes, 1967, E & C Jorgensen, job number 9-S 38, under-reported by $3500.

E & N Tracy, job number 9-S 27, under-reported by $1,881.

A & A Zimmerman, job number 9-S 27, under-reported by $225.

Dovetail Building Corporation, 1968, R & P Gottleib, job number 10-F 1, under-reported by $8,990.

R & L Grandy, job number 139, under-reported by $1,445.

Storybook Manor, for 1968, L & M Pritchard, job number 90-A, under-reported by $368.76.

L & V Delprete, job number 105-A, under-reported by $172.71.

D & A Carey, job number 106-A, under-reported by $2,400.

J. Ventura, job number 111-A, under-reported by $2,751.

L & J Spoltore, job number 115-A, under-reported by $3,250.

R & A Rizzi, job number 128, under-reported by $125.

H. Emmert, job number 130-A, under-reported by $9,232.13.

J & B Cavalieri, job number 146-A, under-reported by $175.67.

J & C Sterbenz, job number 159-A, under-reported by $1,751.50.

Storybook Homes, 1968, J & S Donaghy, job number 9-S 19, under-reported by $742.

J & N Zapata, job number 9-S 6, under-reported by $741.11.

F & D Waldman, 9-S 5, under-reported by $697.11.

J & R Walsh, job number 9-S 4, under-reported by $843.21.

R & S Gilroy, job number 630, under-reported by $626.

R & N Collins, job number 621, under-reported by $619.61.

T & Z Calabrow, job number 9-S 8, under-reported by $759.30.

Q Excuse me. Who was that? Calabrow?

A Yes.

E & J Smith, job number 616,,under-reported by $552.11.

F & L Keller, 9-S 11, under-reported by $825.91.

J & M McAndrews, job number 9-S 22, under-reported by $678.11.

That is all.

Q Now, these, I take it from your testimony, are the result of a comparison that you made between 29 closing statements, and the 29 entries on the corporate books?

A Correct.

Q And based upon those 29 buyers, you find that

according to the closing statement purchase price there was a discrepancy between the price on the closing statement, and what the corporation picked up on its corporate book? Is that right?

A Yes, sir.

Q In those 29 instances, are you contending that the corporation should have paid more income?

A No, sir.

Q All that you are saying, if I understand you correctly, is you have taken the instances where I cross-examined you and I have shown overs, and you have compared them with t' total amount which you have come up with on the 29 buyers that you have said?

A Yes.

Q And giving due credit to the over-reporting that I brought out on my cross, and giving you credit on your schedule, you come up with a difference of some, what is it, 2900?

A In the two year period it is roughly $80,000.

Q Well, now, what was the $2,399.29 that you said was the net result for 1967?

A Right, for 1967 -- However, I note there should be another adjustment there.

Q Well, before we get to the other adjustment, tell us -- When you tell us $2,399.29 as being the net understatement of 1967, what were you telling us?

MR. RYAN: Objection.

THE COURT: Overruled. Explain that figure, please.

A It was referring to under-reporting with respect to Elpa Builders.

THE COURT: Only the one corporation?

THE WITNESS: Yes, sir.

Q And the $26,000 figure for 1968, also only one corporation?

A No, the $26,000 includes computations of all five corporations.

Q Now, I had better state it over again. In other words, taking 68 transactions that I cross-examined you, where you told us that there were overpayments on the books, and that the books reflected dollars more than were shown on the closing statements that I showed you, and giving due credit to your analysis of the 29 other buyers, are you telling us there was a difference in understatement with respect to all those corporations, and we only dealt with four of twenty-six thousand.

A Yes, sir.

Q Is that right?

A Yes, sir.

Q Is that what you are telling us?

A If I understand your question, right, yes, sir.

THE COURT: I wish you would not answer questions unless you know what they mean. If you don't know what they mean, just tell Mr. Bender.

THE WITNESS: All right, repeat that question.

(Record read.)

THE WITNESS: Yes.

THE COURT: The understatement refers to only those 29 purchasers that you examined?

THE WITNESS: The understatement of those 29 is about $80,000.

MR. BENDER: Maybe I can try it another way.

THE COURT: Yes, go ahead.

Q In order for you to make this comparison, what records did you need, and tell us if they are in evidence.

A I used the available closing statements.

Q What do you mean by "available"?

A We did not have all closing statements of all sales.on the corporate books.

THE COURT: Tell us what you did have. Were there 29?

THE WITNESS: Yes. We had the 29.

THE COURT: That is all you had available? Right?

THE WITNESS: For the overstatements.

THE COURT: So you could make the comparison only

with reference to those 29?

THE WITNESS: Yes.

THE COURT: So all the testimony that you gave on what you call overstatements of receipts, and understatements of receipts, refer to only 29?

THE WITNESS: Yes, sir.

THE COURT: Do those 29 also include the number that Mr. Bender inquired on?

THE WITNESS: No, sir.

THE COURT: So you saw 29 plus the number he e examined you on?

THE WITNESS: Yes, sir.

THE COURT: I see. All right, go ahead.

Q That is taking the ones that I examined, and the 29, you came up with this difference?

A Yes.

Q So you only checked 29 out of 92, plus the few I hit you with?

A Yes.

Q Is that right?

A Yes.

Q How many did I hit you with, 10 or 11?

A I don't recall your number.

Q I beg your pardon?

A I don't recall your number.

Q So, we have a vast majority of unknowns, is that right?

A You do.

Q Would you say as a result of your analysis, as an expert, there were considerable bookkeeping errors here, with respect to these transactions?

A I don't think these are bookkeeping errors.

Q You think MR. Hornberger did it, don't you?

THE COURT: Well, if you can't express an opinion as an expert, don't do it. I don't want a speculation or surmise.

A I wouldn't express an opinion on that.

Q You would rather not. You know Mr. Canale was the one, and Miss Paterno who made up the entries in these books, isn't that right?

A Yes.

Q And you know that according to Mr. Canale, and according to Mr. Coletti, Mr. Hornberger never instructed them with respect to any of the entries in these books, isn't that right, according to the testimony in this case?

A Yes.

MR. BENDER: I h ave no further questions.

THE COURT: Anything further?

MR. RYAN: No.

(Witness excused.)

THE COURT: Next witness.

HS fls

(continued on next page.)

THE COURT: Mr. Vilardi recalled.

You understand that you have been previously sworn and you are still under oath?

THE WITNESS: Yes.

ANDREW VILARDI, called as a witness, having been previously sworn by the Clerk of the Court, resumed the stand and testified further as follows:

MR. RYAN: I would like to mark five pages of schedules as the next exhibit.

THE CLERK: So marked as Government's Exhibit 146 for Identification.

(So marked.)

THE COURT: Is the witness going to refer to them specifically?

MR. RYAN: Yes.

THE COURT: One page and another page?

MR. RYAN: Yes.

THE COURT: Why don't we mark every page?

Did you give a copy to Mr. Bender?

MR. RYAN: He has a set.

MR. BENDER: Yes.

THE COURT: 146A, B, etc., whatever the number is.

MR. RYAN: It consists of five pages.

THE CLERK: 146 through 146C, five pages.

MR. BENDER: Then there is another one.

THE COURT: I will accept that.

MR. RYAN: I could be in error.

THE CLERK: It is five pages.

Five pages of schedules marked 146 through 146D, inclusive.

MR. BENDER: C or D?

THE CLERK: C.

MR. RYAN: D as in David.

DIRECT EXAMINATION

BY MR. RYAN:

Q Mr. Vilardi, you told us yesterday how long you have been a Revenue agent. How long is that?

A Six years and ten months.

Q Can you tell us what education you have had?

A I hold a Bachelor of Business Administration as an accounting major from Pace University.

Q Now, in connection with your work on the Hornberger case, did you make any attempt to determine tax sequence as a result of the $156,000 that were deposited in Mr. Hornberger's personal account --

MR. BENDER: That's objected to.

3 Vilardi - direct

THE COURT: The Jury may be excused.

(Jury excused.)

THE COURT: What ground, Mr. Bender?

MR. BENDER: This witness is being qualified as an expert and he can be asked his opinion as to what the applicable tax would be under the applicable status assuming the facts are as follows: That so much was proven to have been omitted from this corporation, that corporation, this corporation. He cannot testify as to the tax sequences as if he is an investigator.

THE COURT: Objection overruled. It is part of the Government's case to prove that a substantial tax was due and under our form of the hypothetical, the facts need not be incorporated into the hypothetical.

You may cross-examine. I will allow him to answer.

How many times have you done this?

THE WITNESS: Hundreds of times throughout the years.

MR. BENDER: Your Honor, the question is: How many times have you questioned --

THE COURT: No, no.

4 Vilardi - direct

How many times has he computed the taxes?

THE WITNESS: Hundreds of times.

THE COURT: I will allow you to ask that question before the Jury. I think this witness is expert enough. If you need an expert with the table that they send, I think he is expert in the field to make the simple computation that almost every layman can make.

MR. RYAN: I am looking for 145.

MR. BENDER: I gave it to Mr. Mazzella when he was at the stand. My copy that you gave me, I think I had. Did I --

MR. RYAN: Could you check your table?

MR. BENDER: Surely.

THE COURT: If no tax had been paid by the corporation, you might have more trouble then if a tax had been paid?

THE WITNESS: That's right.

THE COURT: You wouldn't know what credits were due against the tax liability, but having paid the tax, you just use the gradations under the tax law and tax at the rate of the increased income.

THE WITNESS: That's right.

THE COURT: I might even be able to do that.

5 Vilardi - direct

All right. Seat the Jury.

(Jury present.)

THE COURT: The objection was overruled.

You may answer.

BY MR. RYAN:

Q Mr. Vilardi, I would like to ask you this question.

Because of your duties, have you had occasion to do computations based on alleged deficiencies of reported income?

A YEs, I did.

Q About on how many occasions, approximately?

A Throughout the years, I would say a couple of hundred times.

MR. BENDER: I didn't hear --

THE COURT: Mr. Shapiro.

THE WITNESS: Throughout the years I would say a couple of hundred times.

Q Now, are you familiar with the evidence that has been received in this case?

A Yes, I am.

MR. BENDER: I object to that question, your Honor.

THE COURT: Well, I will sustain the objection.

6 Vilardi - direct

Technically he is right.

Assume the facts in the record --

Q Assuming the facts in the record, relating to the approximately $156,000 paid as extras and deposited to Mr. HOrnberger's account, are you able to state an opinion as to how much should have been reported on the tax returns in evidence in this case?

MR. BENDER: Excuse me.

What was the figure you gave?

MR. RYAN: $156,000.

MR. BENDER: You are a dollar over the stipulation. I withdraw the objection.

THE COURT: All right.

THE WITNESS: Yes, I am.

BY MR. RYAN:

Q Now, can you give us your opinion with respect to the personal income tax returns of Mr. Hornberger for the year '67; yes or no?

A Yes, I can.

Q Have you made any schedules which would reflect your opinion?

A Yes, I have.

Q And are they before you?

A Yes, they are.

7 Vilardi - direct

Q Now, would you state your opinion -- first of all, can you tell us what taxable income was reported on Mr. Hornberger's 1967 individual income tax return?

A The taxable income shown on Mr. Horberger's personal income tax return for the year '67 showed a figure of $19,962.38.

THE COURT: Would you explain taxable income to the Jury please?

THE WITNESS: Taxable income is arrived by taxing the entire income shown on the return for the individual, less all deductions that the individual is entitled to, less his exemptions.

THE COURT: What is left?

THE WITNESS: The taxable income.

THE COURT: The income that tax is due on?

THE WITNESS: That's correct.

THE COURT: All right.

BY MR. RYAN:

Q Based on the evidence in this case, can you tell us your opinion as to what should be reported on the Hornberger personal tax return?

MR. BENDER: I object to the form of the question.

THE COURT: Sustained as to form.

8 Vilardi - direct

What was the tax due on April 15, 1968, for the tax year 1967, on Mr Hornberger's -- it was a joint return, was it?

THE WITNESS: Correct.

THE COURT: The return based on the taxable income for the year '67?

THE WITNESS: Well, according to the taxable income shown on the return, the tax due by Mr. Hornberger was $4,369.47 for tye year 1967.

THE COURT: All right.

BY MR. RYAN:

Q For the year 1968, can you tell us what tax was due?

A Again, for the year 1968, the tax due shown by the return of Mr. Hornberger showed a figure of $26,600.76.

Q Can you state your opinion as to what tax would have been due based on the extras Mr. Hornberger had received and deposited into his personal bank account?

MR. BENDER: I am going to object to the form of the question, your Honor.

THE COURT: Sustained as to form.

Assume for your purposes that the deposits made during the year 1967 were the proceeds of extras performed for the various purchasers that

closed title during 1967, do you have an opinion as to what the tax would be?

THE WITNESS: I do.

THE COURT: What would it be?

THE WITNESS: Okay. For the year 1967, this corrected tax would be $23,703.74. For the year 1968 this corrected tax would be $92,711.13.

BY MR. RYAN:

Q Now, I would like to direct your attention to the Dotal Corp. tax returns.

Can you tell us what the taxable income -- first of all, can you tell us what tax was reported due by the Dotal Corp. on the 1967 tax return?

A The Dotal Corp. tax return for the year 1967 showed a tax due per the return of $367.81.

Q Are you familiar with Government's Exhibit 145?

(Shown to witness.)

A Yes, I am.

Q Assume -- assuming -- withdrawn.

That schedule reflects alleged extra income to the Dotal Corporation, does it not?

A Yes, it does.

Q You know who prepared it?

A Yes, I do.

10 Vilardi - direct

Q Mr. Mazzella?

A Correct.

Q Assume that the Dotal Corporation received the additional income as proceeds from extras shown on that schedule.

Are you able to tell us or state an opinion what the taxable income would have been?

A Okay.

For the year 1967, this corrected taxable income would have been $7,090.20.

Q What was the tax reported due by that corporation for that year?

A The tax reported on the return shows a figure again of $367.81.

Q Can you tell us your opinion as to what tax would have been due based on the additional extra income?

A Based on the additional extra income, there would have been an additional deficiency or tax due of $1,192.03 for the year 1967.

MR. BENDER: Excuse me, Mr. Ryan.

By the witness saying extra income, you are referring to "extra" meaning the extras?

MR. RYAN: Absolutely.

MR. BENDER: Okay.

11 Vilardi - direct

BY MR. RYAN:

Q For the year 1968, and based on the schedule of extras income to the Dotal Corporation, are you able to state an opinion as to what should have been reported as the taxable income?

A Yes, I am.

Q What should have been reported?

A The corrected taxable income for the year 1968, including these extras would have been $15,003.86.

Q What was reported?

A The taxable income shown on the return for Dotal for 1968 showed a figure of $781.95.

Q Can you state how much additional tax would have been due by the Dotal Corporation in 1968?

A The additional tax deficiency that would have been due by Dotal for the year 1968 is $3,441.71.

Q Now, I would like to direct your attention to the Horn Enterprises tax returns.

Assume the facts as shown in the schedules before, Exhibit 145, concerning the year 1967 for Horn Enterprises with respect to income from extras. Are you able to tell us your opinion as to what taxable income should have been reported by the Horn Corporation?

A The Horn Corporation for the year 1967

should have reported a taxable income of $17,473.20.

Q Can you state your opinion as to what additional tax would have been due by that corporation?

A The additional tax deficiency due on Horn Enterprises for the year 1967 would have been $3,393.72.

Q For the year 1968, the Horn Corporation, are you able to state an opinion as to what the taxable income should have been on the return?

A Yes, I am.

Q What should it have been?

MR. BENDER: Is this based upon the assumption of the schedule, 145A?

THE WITNESS: Yes, it is.

MR. BENDER: I didn't ask you, I'm sorry.

THE WITNESS: I thought you were asking me a question.

MR. RYAN: The answer is yes.

MR. BENDER: Thank you.

THE WITNESS: I'm sorry. I forgot the question.

BY MR. RYAN:

Q Can you state an opinion as to what taxable income should have been reported on the Horn tax return for 1968?

13 Vilardi - direct

A The taxable income that should have been reported on the Horn Enterprises tax return for 1968 is $925.18.

Q What additional tax would have been due?

A There would have been due additional tax on this 1968 return of $223.89.

Q Now, I would like to direct your attention to Story Book Manor tax returns.

Assuming the extra income is shown in the schedules before you, are you able to tell us your opinion as to what should have been reported as taxable income for 1967 asto Story Book Manor?

A Yes.

Q What should it have been?

A For Story Book Manor, Inc., for the year 1967, the taxable income that should have been reported $12,994.42.

Q What would have been the additional tax due on that taxable income?

A The additional tax due on Story Book Manor, Inc., for the year 1967, $2,473.09.

Q Can you tell us your opinion, assuming the figures shown in the schedules before you, what the taxable income should have been repoted for Story Book Manor for the year 1968?

A The taxable income that should have been reported on Story Book Manor for the year 1968 is $38,968.23.

Q Can you tell us what additional tax would have been due on that amount?

A The additional deficiency due on Story Book Manor Inc., for the year 1968 is $12,960.90.

Q I would like to direct your attention to Story Book Homes tax return.

Did that corporation owe any corporate tax?

A This corporation does not owe any corporate taxes.

Q Was it required to report -- was it required to file a return?

MR. BENDER: That's objected to, your Honor.

THE COURT: I will allow it.

THE WITNESS: This corporation is required to file a return.

Q What kind of a return?

A This corporation is required to file an information return on Form 1120S.

Q What is required to be stated in that return?

A In this particular return are required to be stated the gross income less all application deductions arriving at a taxable income figure.

Q All right.

Now, assuming the figures as shown in the schedules before for the Story Book Homes Corporation, are you able to tell us what taxable income should have been reported?

A I am -- yes, I am.

Q What amount?

A For the year 1967 on Story Book Homes, Inc., the corrected taxable income that should have been reported as follows: For 1967 the figure is $15,534.48.

Q What taxable income was reported on that return?

A The taxable income shown on the return was $4,633.98.

Q For the year 1968, are you able to state an opinion as to what taxable income should have been reported by the Story Book Homes Corproation?

A Yes, I am.

(Continued on next page.)

fols.

DIRECT EXAMINATION

BY MR. RYAN: (Cont.)

Q How much?

A For the year 1968 the correct taxable income that should have been reported is $62,834.83.

Q What taxable income was reported on the return?

A The taxable income reported on the return was $1,625.14.

Q Now, Mr. Vilardi, are you able to tell us the total tax due?

A Yes, I am.

Q For Mr. Hornberger's returns, and these corporations that had to pay the tax -- the three corporations. Could you give us the sum total of all the additional tax due?

MR. BENDER: Could we have the question read back?

THE COURT: Read it.

(Record read.)

MR. BENDER: I object.

THE COURT: Objection sustained.

Each count is a separate charge against Mr. Hornberger personally for '67 and '68, for the corporations for '67 and '68. You must determine

or the Government prove each charge. Evidence as to what the total is might be deceptive.

MR. RYAN: I offer into evidence Government's Exhibit 146.

THE COURT: Any objection, Mr. Bender?

MR. BENDER: Your Honor, I object to it.

THE COURT: You don't have to say anything further.

I will hear argument on the latter. Have you completed your direct examination?

MR. RYAN: Yes.

THE COURT: Decision reserved on that offer.

Any cross-examination?

MR. BENDER: Yes.

CROSS-EXAMINATION

BY MR.BENDER:

MR. BENDER: I might clarify my objection at this time anyway, your Honor.

Q Mr. Vilardi, I assume that when you gave us your opinion as to what the tax sequences -- what the additional taxes were with respect to each of the corporations and the invididual, you calculated that tax on some basis of law, did you not?

A Yes, I did.

Q Now, which revenue act did you use to determine what rates should be applicable into what amounts of money represented his income?

A I used the General Revenue Act in force, referred to quite simply as the 1954 Code.

All right, now for the specific computations of each individual tax deficiency, and see, I used the applicable tax rates for those applicable related years shown on the form and other related instruction material that accompanied the form.

Q What particular section of the Internal Revenue Code did you rely on?

A What particular section of the code, I do not know specifically at this point. I would have to research the specific section.

Q So that these rates that you gave us -- withdrawn.

You used certain rates to calculate the additional tax?

A Correct.

Q Do we understand by your last statement that you estimated what the rate of tax might be?

A That is incorrect.

Q In other words, without being able to give us a specific section, is it just based upon your experience that you know such rates apply if you have so many dollars of additional income?

MR. RYAN: Objection.

THE COURT: Overruled.

A I used the rates that were shown in the applicable tax return for the applicable year.

THE COURT: By the applicable tax return -- the applicable rates, you mean the tables that accompany the tax return?

THE WITNESS: Your Honor, in relation to corporate income tax return there is a separate schedule shown in the return that is utilized to compute the tax.

This particular schedule shows the applicable tax rates for that particular year.

THE COURT: Are those the tables that you used throughout theyear in your daily work?

THE WITNESS: I would use the tables shown in the return.

BY MR. BENDER:

Q Did you also have a table on the individual return?

A I used the individual instruction booklet for the applicable related years for Mr. Hornberger.

There is a formal Government publication that is issued to the public which shows the applicable rates to be utilized for these particular years.

Q Do you have it with you?

A I do not have the booklet in front of me.

Q Just for our benefit, we'd appreciate, take Exhibit 8, could you just show us -- this has been introduced as the Dotal Building Corporation 1967 return.

Show us the applicable statutory rate-- the rates that you are talking about?

A Surely.

If you will refer to schedule J called tax computation. There is a format here involved in the schedule that shows line by line and detail by detail how to compute the tax for this particular return.

Included in the format are the various applicable rates. If you would refer, sir, to line 4A and B the rates are so stipulated. For example, on line 4A it states that you must take 22 percent of line 1, if you refer to line one this line denotes taxable income.

If you look at line 4B, it states that you must take 26 percent of line 3. This percentage refers to the remainder that is left over after you subtract your

surtax exception from your taxable income.

Q With respect to the corporations you actually used the computation listed on the return?

A That's correct.

Q But you can't do that with the individual?

A That is correct.

Q With regard to Mr. Hornberger's additional tax which you have given us for 1967 and 1968, did you refer to any specific provision of the Internal Revenue Code in order to determine that rate?

A I cannot answer that question in the context in which I feel you are asking me it. I feel you are asking me two different questions at the same time.

MR. RYAN: objection.

THE COURT: I will allow that answer to stand.

Q Please, tell us how you arrived at the additional tax for 1967 and 1968 of Mr. Hornberger?

A Okay. I arrived at the additional tax for Mr. Hornberger for the years 1967 and 1968 as follows:

I took his taxable income shown on his particular return, I added these alleged additions and arrived at a corrected taxable income. Using this -- you want me to continue or --

THE COURT: Continue the answer.

A (Continuing) I thought I was being stopped.

MR. BENDER: No, we wouldn't stop you.

THE WITNESS: Using this corrected taxable income as the base, I then used the applicable related tables shown in the Government's instruction booklet for individuals and applied these tables to each of these related different taxable incomes for the related years and I arrived at the tax.

BY MR. BENDER:

Q You did not look at Section 316 of the Internal Revenue Code at all?

A No, I did not, for the computation of these related taxes specifically.

MR. BENDER: I move to strike --

THE COURT: Motion denied.

MR. BENDER: Do you want me to say what I am moving to strike?

THE COURT: If you wish I will excuse the jury.

MR. BENDER: I just wanted to indicate what I wanted to striek.

THE COURT: I thought you wanted to strike this witness' testimony with reference to the computation

of the tax of the Hornberger individual return.

MR. BENDER: That I am.

THE COURT: Motion denied.

Q These schedules, which reflect your opinion -- withdrawn.

Your opinion which you gave us which is reported in these schedules -- I withdraw that.

These schedules which you prepared, when did you prepare them?

A I would say approximately --about a month or so ago -- I cannot recall --

Q Prior to the trial in this case?

A That is correct.

Q These figures are substantially based upon the counts in the indictment are they not?

A Correct.

Q As a matter of fact, almost to the penny?

A That's correct.

Q What you simply did was simply take the amounts that are listed in the indictment and put them in your schedules and give us the results; is that right?

A Substantially that is correct.

Q Now, you treated this income of Mr. Hornberger -- assuming the state of facts which was given to you by

Mr. Ryan and which you got from Exhibit 145 for identification -- that's a list of all the buyers that Mr. Mazzella made up with the extras and with the corporation on top?

A Correct.

Q You got -- that additional tax by in effect treating the extras which belonged to the corporation as ordinary income to Mr. Hornberger; is that right?

A That is correct.

Q Did you treat that as -- withdrawn.

What was the nature of the additional income that you considered that to be in framing -- in giving us your opinion as to the additional tax, was it the additional salary, was it additional commissions, was it additional compensation of some kind -- just tell the Court and the jury whether that would make a difference.

A The answer to your question is as follows:

The nature of the additional income would have to be broken down into two catagories: Catagory No. 1, I would call dividend income which would relate to those extras being charged back to Mr. Hornberber as dividends from the regular 1120 corporations.

Q Excuse me. The regular 1120 corporations are Story Book Manor --

A Dotal and Horn Enterprises.

Catagory 2, would show the -- would reflect additional taxable income on Mr. Hornberger's return from Story Book HOmes, which is a subchapter S corporation.

This additional income would be referred to as additional taxable income on Mr. Hornberger's personal return.

Q You are telling the Court and jury there would be a difference in the way in which you would consider the income allegedly received by Mr. Hornberger, insofar as it relates to the threel120 regular corporations-- Dotal, Manor and Horn -- and the Story Book Homes, which was the 1120's; is that right?

A In connection with the type of income the answer to your question is no.

Q Well, with respect to the dividend income, is it your testimony that you calculated the additional tax in this case -- as testified to -- based upon the theory that Mr. Hornberger as the stockholder of these three corporations, received a constructive dividend which was in the form of income that he should have reported on his individual returns?

A The answer to your question there is yes.

Q Now, I ask you in determining that did you apply Section 316 of the Internal Revenue Code?

A I do not know what 316 of the Internal Revenue Code -- as far as the specific area that you are talking about within the section applies to it.

Q Don't you know that defines the nature of a dividend?

A Again in answer to the context in which you are putting the question to me I cannot answer that question.

Q In order for Mr. Hornberger to have received a constructive dividend from Dotal, Horn and Manor, wouldn't there ahve to be some basic conditions before -- which have to be proven -- before -- before there could ever be a dividend to him?

A The answer there is yes.

Q Isn't that -- aren't those conditions referred to in Section 316 of the Internal Revenue Code --

THE COURT: Objection sustained.

If you would like to read 316, you may read it.

MR. BENDER: He is the expert, your Honor.

THE COURT: He isn't the expert on the law. He is expert on the computations.

I don't know whsat 316 means. I will have to read it to learn it.

Next question, Mr. Bender.

Q I take it then that in giving us the benefit of your opinion with respect to the additional taxes that Mr. Hornberger owed -- assuming the state of facts in 145 -- you did not consider those conditions that would have to be proven in order to construct the dividend; is that right?

A I cannot answer that question simply because I do not know what conditions you are referring to.

Q Well, you said that there were certain conditions that would have to exist before you could construct the dividend.

A That is correct.

I don't know what conditions you are referring to.

Q You are the expert.

MR. RYAN: Objection.

THE COURT: Objection sustained, it's argumentative.

Q What are those conditions if you know?

A Are you asking me a general question as to general conditions -- is this your question?

Q I am asking you based upon this case: Assuming the facts in 145 for identification -- assuming all of it is true --

A Okay.

Q -- what are the conditions that the Government has to show in order to say that that man got a constructive dividend?

A The conditions are as follows:

Condition No. 1: That it must be shown that the corporation included these extras as income on its corporate income tax return for the related respective years.

Condition No. 2: Insofar as it is deemed or alleged in this particular case that the corporation has included these amounts as additional income in its corporate returns by the fact that Mr. Hornberger deposited these checks to his personal accounts, he has enjoyed the benefit of the use of these monies.

Under these circumstances, it would be deemed to be a dividend to Mr. Hornberger, respec tively.

Q Are those the conditions?

A These are general conditions I am stating to you.

MR. RYAN: Objection.

THE COURT: Mr Bender, you are transmitting your disbelief and amazement.

MR. BENDER: I'm sorry.

THE COURT: Youare asking this witness to express

an opinion as a matter of law.

I won't permit any further questions that relate to it.

This witness is not being presented as an expert on tax law.

MR. BENDER: Do you want me to stop?

THECOURT: I preclude any further questioning that calls for an opinion on the tax law.

BY MR. BENDER:

Q With respect to your computations, the corporations -- assuming the fact as Mr. Ryan said to you -- would owe additional income to the extras; is that right?

A Correct.

Q Your computation was based upon what the tax would be if they had included the additional extras?

A That is correct.

Q Then you are saying that the same extras which the corporation would have been required to pay a tax on, those same extras when Mr. Hornberger put them in his bank account, he received a constructive dividend to which he has to pay a tax on it; is that right?

A Yes.

Q Under your theory on the taxation of the same extras, the corporation pays the tax on it and Mr. Hornberger pays the tax in addition?

A That is correct.

BB
4-2

Q In order for Mr. Hornberger to be charged with a constructive dividend, so that there would be additional taxes due and owing, and since the corporation is being charged with the income also --

A Yes --

Q Does the corporation have to have earnings and profits?

A The corporation must have earnings and profits to reflect a dividend distribution to Mr. Hornberger.

Q That's one condition, then; is that correct?

A That is correct.

Q And did you consider that in giving your opinion as to the additional taxes on Mr. Hornberger on 1967 and 1968?

A Yes, I did.

Q And what earnings and profits did you consider for each of the corporations that would qualify so that a constructive dividend could be applied?

A I am sorry, sir, but I do not understand your question. I don't know whether you are referring to amounts or balances of accounts for specific dates or whathaveyou. I don't know what you are referring to.

Q Did any of the alleged income which you say Mr. Hornberger received based upon the assumption of 145 exceed the amount of earnings and profits of these corporations

individually as well as their retained earnings?

Do you understand the question?

A No, you threw two things at me.

I'm thoroughly confused about your question.

THE COURT: We will suspend at this point for lunch. I will ask the jury to return at 2:15.

(Whereupon jury leaves courtroom.)

THE COURT: Now, on the schedule.

MR. BENDER: I certainly object to 146 for identification, because in my opinion there was an improper foundation laid for the figures. The figures as calculated are incorrect based upon the theory of the Government that Mr. Hornberger's income was a constructive dividend.

THE COURT: Are you saying that the Government -- those who are not before me please sit down. It is most distracting.

Are you saying that the Government called this a"constructive dividend" and as a constructive dividend it might be possible at a lower rate? Is that what you are saying, Mr. Bender?

MR. BENDER: It might not be taxable at all if it was not proven to be --

THE COURT: Suppose the Government didn't say --

MR. BENDER: Would you let me finish, please.

THE COURT: Yes.

MR. BENDER: Unless you understand the theory -- I know you are far ahead of me -- but let me try to explain it.

There are totally different ways in which you figure a tax, depending upon whether you have ordinary compensation, salaries or other types of income and where you are trying to construct a dividend because in effect you have to apply the statute which defines what a dividend is.

What the theory of the Government is this: that Mr. Hornberger who is the sole stockholder of these corporations diverted corporate income into his own pocket so to speak. We say that he, therefore, received a dividend --a constructive dividend from the corporation. Now, the law is clear, before you can say Mr. Hornberger received a constructive dividend, you follow specific statutes which define the term. Unless those conditions are met, there is none.

THE COURT: Is that your full argument?

MR. BENDER: That is what I am trying to say.

THE COURT: Is that your full argument?

MR. BENDER: On the constructive dividend.

Vilardi-cross

THE COURT: I want to know when you are through and I will give you my offhand opinion why I think that vigorous argument that you are making from the outset falls by the wayside.

MR. BENDER: All right, your Honor.

THE COURT: Number one, we are only talking about Mr. Hornberger's income tax return --

MR. BENDER: At the moment.

THE COURT: -- Counts 1 and 2?

All right, the answer is "yes."

MR. BENDER: I am sorry.

THE COURT: As far as the Chapter S Corporation--

MR. BENDER: Doesn't apply.

THE COURT: Let us look at the income that the Government claims that he got out of Chapter S, Story Book, right?

MR. BENDER: Go ahead.

THE COURT: They say $50,000.00 in 1967 and $62,000.00 in 1968. Let us assume the Government proved no other dividend coming out of any other corporation. All the Government must prove was there was a substantial understatement and that they owed the Government a substantial tax, not the specific amount.

Vilardi-cross

You can argue about the three corporations and give me any kind of theory you want and let's assume the Government was all wrong and he should have been not taxed a nickel's worth, but it is a question of fact for the jury and that is the way I will charge it.

There is still another theory -- and I do not propose to be a tax expert. I probably know less than Mr. Vilardi who you tried to qualify as a tax expert in lax law. It is just my impression that if an individual wrongfully takes from a corporation -- appropriates the money and puts it into his account -- he is charged with the money as normal income just as an embezzler might be charged. I do not know whether that theory is one of the Government's theories and I do not know if I am correct. It strikes me as pure basic logic.

You want to steer the Government onto a course of constructive dividend and you say the Government elected that apparently.

Well, first, I do not know whether the Government elected to do that because to this moment I have not gotten the transcript of the pre-trial and I wasn't present when the so-called bill of particulars were made.

Vilardi-cross

You can respond to that, Mr. Bender, because I know you are deep in tax work.

MR. BENDER: Your Honor, I suggest that you read Di Zenzo (phonetics) against the Commissioner, which is an opinion in the 2nd Circuit.

THE COURT: Which is that?

MR. BENDER: Di Zenzo against the Commissioner.

THE COURT: From the title that is not a criminal case.

MR. BENDER: It doesn't make any difference.

THE COURT: It certainly does.

MR. RYAN: Correct.

THE COURT: In a civil case, the Government must prove by a preponderance of the credible testimony what it is entitled to for the jury can return a verdict on the amount due.

Here the Government must only prove that a substantial amount of the taxes due.

You might speak of a double tax --

MR. RYAN: That case is 348Z 2nd --

MR. BENDER: Can I tell you why I am citing it to you?'

THE COURT: What is the page?

MR. RYAN: 122.

MR. BENDER: -- Because the very argument was made in that case, namely that the Government -- it is true it is a civil case -- the Government does not have to prove where there is a diversion of income by a stockholder -- just as the Government claims here -- they don't have to denominate it -- the kind of income. It could be salary, compensation, bonuses. The 2nd Circuit said absolutely not. There was only one way in which you could charge that man with income, that's why a constructive dividend theory and that's what Di Zenzo (phonetics) holds. I am only saying to you that I have been trying this case right from its inception, based on the Government's statement and the pre-trial conference here and in this report which they turned over to me that this is a constructive dividend case, and I say to you -- to your Honor -- that is what I have been trying to work up to here.

In order for your Honor to charge this jury correctly, you have to charge them on Section 316 of the Internal Revenue Code and the regulations issued thereunder.

THE COURT: You finally have come to your requests --

MR. BENDER: I knew I shouldn't have.

THE COURT: You are talking about requests to charge and you are going to request that -_ this is your theory. Why don't you put it before me?

MR. BENDER: It is the Government's theory.

THE COURT: It is your defense then.

MR. BENDER: Judge, what do you mean by "defense?" I just want the proper connotations to be made. You are accepting Mr. Vilardi's statement just like it is ordinary income. That is all I was objecting to.

THE COURT: I am saying something different.

MR. BENDER: I agree with you about Counts 9 and 10. I still have the right to whittle down the tax, don't I?

THE COURT: Put in that perspective, I could understand. I thought you are arguing that that defeated the claim.

MR. BENDER: You are way ahead of me. I wasn't thinking about that at all. I am trying to knock out the counts one by one and you want me to knock the whole thing out. I figure if I knock out one at a time, it will be helpful to the defendant.

THE COURT: Do you want to come in and argue this, Mr. Bender?

MR. BENDER: Where?

THE COURT: At 2:00 o'clock.

MR. BENDER: I do not know if there is anything further to argue.

THE COURT: I haven't heard Mr. Ryan.

MR. BENDER: I will be back at 2:00 o'clock.

THE COURT: Have you anything to say about it?

MR. RYAN: At the moment I do not. I had difficulty in following the argument of Mr. Bender.

MR. BENDER: I am not too clear, your Honor. I apologize.

THE COURT: I know what he is saying.

This was income to the corporation and when Mr. Hornberger got it, it was the same as if it came through the corporation, but before you know whether he could get it you must know whether the corporation had losses and whether it could be deducted and you should have made a complete audit of every corporation --

MR. BENDER: They did.

THE COURT: If it was available for dividends --

MR. BENDER: They did. The testimony is that have. There are revenue agent reports issued for every one of these corporations listing the civil liabilities.

THE COURT: Does it show that there were, was surplus available in the form of dividends?

MR. BENDER: You are asking me? This is the Government's proof. They have to prove a deficiency beyond a reasonable doubt.

THE COURT: Now we are talking about burden of proof and admissibility of evidence.

We may very well be talking about a matter that on its face is evidence that it was a constructive dividend in favor of the stockholder -- its face.

It was received on the basis of the profits they made in 1967 and 1968, that it was available. It may not be available. It may be subject to explanation.

What you are saying is the fact that he received this money and that the corporation didn't make a profit in those years, that it's not introduceable into evidence without a showing by the Government of some proof that this money in fact was available for dividends.

That's a slightly different question than you put. You are just saying that in a civil case, in order to establish a right of the Government to a tax, they must show that the corporation at the time this was done was in a position to declare a dividend -- it was surplus.

Vilardi-cross

MR. BENDER: Judge, when we try a criminal tax evasion case, one of the substantial elements is a substantial tax due and owing. You don't talk the Internal Revenue code. Section 3201 says only one who unlawfully attempts to evade. That's why I cited Di Zenzo (phonetics).

THE COURT: The purpose is a lot different in a civil than in a criminal case.

MR. BENDER: You will find there they put the burden on the taxpayer, because when the Commissioner asserts a proposed deficiency in tax, under the statute, there is a presumption that it is correct and the burden is put on the taxpayer.

THE COURT: I am not going to write the opinion reversing or firming, but I might say you are almost pointing to what I am saying.

In a civil case, where the Government is suing to recover, all it need do is establish the right to the tax and the burden shifts -- the burden of going forward shifts to the taxpayer, because he knows what has been happening with the corporation and that's a defense.

MR. BENDER: Not if they specifically present' the theory on which they are claiming there was

11a additional income.

THE COURT: You come back at 2:00 o'clock.

MR. BENDER: Could we make it a little later?

THE COURT: I am having the jury come back at 2:15.

(Luncheon recess taken.)

AFTERNOON SESSION

(The following occurred in the absence of the jury.)

THE COURT: Where is Mr. Bender?

THE CLERK: Right outside, your Honor.

THE COURT: Mr. Ryan, do you have anything to say about the argument made by the defendant here?

MR. RYAN: I find the argument is addressed to specific evidence and specific issues in the case. He has an argument attached to the schedule, No. 1, prepared by Mr. Vilardi. On that point, this schedule represents a summary of his testimony. I think it's admissible for that purpose alone. It's not evidence. It's a summary to aid the jury.

No. 2, if he's arguing that the Government does not -- has not proved Counts -- has a deficiency in proof, because it hasn't offered evidence of the financial condition of the corporation to declare a dividend attributable to Hornberger for his individual return, we answer this. Mr. Vilardi in fact did do that. He had to do that in order to compute what the taxable income should have been.

I did not elicit it on direct because I thought it would simply confuse; but the witness is here and he can be thoroughly cross-examined about

how he computed the taxable income to be reported by Hornberger on his individual --

THE COURT: You haven't met the argument at all. Now we are talking about -- first we are talking about what the Government agreed to, and Mr. Bender says that the Government agreed that the income from the extras except from the Chapter S corporations were constructive dividends.

Now, in Dizenzo -- Dizenzo apparently rejects the suggestion I had, that money taken from a corporation unlawfully can be treated as normal income.

So you may be confined to the theory that this was a constructive dividend.

MR. RYAN: We are.

THE COURT: All right. The argument here made is under 316. You cannot have a dividend unless it's declared out of earnings of surplus.

MR. RYAN: Well, all right. That's no problem because Mr. Vilardi in computing the taxable income took those considerations into account.

As a matter of fact, as Mr. Bender knows from the Regional Counsel's statement, they did not attribute all of the extras -- they did not attribute $4,500 of extras to Hornberger because to that extent there would not have been a surplus, taking into

account the upper -- the balance sheet of the corporation.

THE COURT: When were these corporations organized, can you tell me?

MR. RYAN: It's on the tax return, I'm sure. Date incorporated, September, '62.

THE COURT: September?

MR. RYAN: September, '62.

Story Book Homes, February, 1960.

Story Book Manor, October, '61.

Horn Enterprises, March, '63.

I think I've covered them all.

MR. BENDER: Elpa?

MR. RYAN: That's not an issue in the case.

THE COURT: Now, has the Government audited all the returns of the corporations from date of incorporation?

MR. VILARDI: I am not aware of that, your Honor. Only my years.

MR. RYAN: Evidently not.

THE COURT: Is anyone able to testify as to when these corporations became active and on which day they started doing business?

MR. RYAN: We do not have any specific evidence referring to the length of activity prior to

'61.

THE COURT: Not prior to '61.

MR. RYAN: Except -- '67.

THE COURT: '67.

I have been unable to find any case on it. The only case that I found that discusses 316 is the one pointed out by counsel, Dizenzo against C.I.R., and I find that on the question of the admissibility of the evidence, that a foundation has been established by proof that this corporation during the two years -- these corporations during the two years, 1967, 1968, paid a dividend -- paid a tax, except one. I am not referring to Homes, incidentally. I am not referring to the Chapter S corporation.

I am referring to Story Book Manor, Inc.; Horn Enterprises, Inc.; and Dotal Corporation. Only Dotal. I'm sorry. Only Horn in 1968 failed to show taxable income. By theparentheses around the $104.82, I assumed it showed a loss.

MR. RYAN: That's correct.

THE COURT: That loss was taken into consideration in computing what the dividend would be in the event the extras were chargeable to Horn.

MR. MIZZELLA: That's correct.

THE COURT: The problem was pointed out by

Judge Lombard in Dizenzo, 348 F. 2d, 122, Second Circuit, 1965, at pages 126 and 127.

"The Government has in this case pointed to the difficulty of reconstructing the earnings and profits of Patsy Frank," which was the corporation, "...in view of the corporation's hopelessly inadequate books and records. The answer to this problem is not to give a special meaning to the language of Section 115, which, incidentally, is Section 316 of United States Code.

MR. RYAN: Correct.

THE COURT: Title 26.

MR. BENDER: No. Internal Revenue -- yes.

THE COURT: It's the old code.

MR. BENDER: Yes.

MR. RYAN: Right. A new number.

THE COURT: That is right.

"However, but rather to place the burden on the individual taxpayer to establish that the corporation did not have earnings in profits equal to the amounts diverted."

Now, I do not think that that's shifting the burden of proof to the defendant. The Government still has the burden of proving the guilt of the defendant beyond a reasonable doubt.

I do think that this evidence is admissible and, of course, subject to explanation and rebuttal by the defendant, explaining that these monies were not dividends because the Government had no earnings as surplus during those years.

MR. RYAN: The corporations had no earnings.

THE COURT: What did I say?

MR. RYAN: Yes. You misspoke. That's all.

MR. BENDER: Would you like me to just comment briefly on that, your Honor?

THE COURT: Yes, surely.

MR. BENDER: I think, your Honor, I say this with greatest respect, your interpreting that one paragraph of Judge Lombard's opinion without considering the reasons why he made that statement, and that is this:

THE COURT: Oh, I -- the previous sentence I read, he said the Patsy Frank records, without even referring to the opinion, were in a mess.

MR. BENDER: No. What I'm trying --

THE COURT: When he talks about "place the burden on individual taxpayers," in the plural.

MR. BENDER: You know the reason why?

THE COURT: Why?

MR. BENDER: You see, it's a civil case.

THE COURT: Yes.

MR. BENDER: The presumption of the correctness of the proposed deficiency existed and the burden of disproving the correctness of the Commissioner's determination was a burden that the taxpayer had to maintain.

THE COURT: Yes.

MR. BENDER: The only reason why the Circuit Court said that the burden is on the taxpayer, to prove that there were not sufficient earnings in profits and accumulated, retained earnings, is because the burden was on the taxpayer in the beginning, since there was a presumption of correctness. The burden was on the taxpayer to overcome the presumption. Therefore, the burden was on him.

But in this case the burden at all times is on the Government to prove the correctness of the deficiency asserted against the defendant.

THE COURT: I disagree with you there.

MR. BENDER: Okay.

THE COURT: The burden of proving the guilt of the defendant as one of the essential elements of the crime charged is that there was a substantial deficiency. Not to prove the amount of tax due.

I say, I am ruling on this as a matter of

evidence, the admissibility of the evidence, and I say there is enough to indicate that the corporation had earnings in surplus and that in accordance with 316 -- and that is the only relationship the argument has to 316 -- is that it may be considered a constructive dividend.

MR. BENDER: Just so that the record is clear and nobody ever says, if this should go wrong, that I haven't called to your attention every aspect of this, I want to add that not only does the 316 apply here, to show that there were earnings in profits, current earnings in profits, and under the statute you first look at current earnings and then go to retained earnings or accumulated earnings, those earnings and profits or accumulated earnings must be further reduced by the amount of the proposed income tax deficiencies that are proposed against these corporations.

THE COURT: If you look at the balance sheets of these corporations, the earnings in profits are net amounts after taxes are paid. So in order to determine whether there is sufficient earnings in profits here, you have to take the figures that Mr. Villardi indicates in his revenue agent's report, copy of which Mr. Ryan was good enough to give me, and you have to

reduce each one of the earnings in profits by that amount.

And I say to you --

THE COURT: Because those would be taxable to the corporation and wouldn't be available for dividends, you are saying?

MR. BENDER: Exactly.

THE COURT: You can bring that out on cross-examination.

MR. BENDER: No. I say that there is a failure of proof. To have considered that --

THE COURT: I say again, so I make my position clear --

MR. BENDER: You say the burden is on us.

THE COURT: No. I want to make it very clear that I understand your argument, and even though the burden is greater in the criminal case than the civil case, the burden of proof, the elements are different. The Government need not prove beyond a reasonable doubt the precise amount of tax that was due. It need only prove that a substantial amount was due.

The Government need not prove with any degree of accuracy how much the tax would have been to the corporation.

The witness has testified, the defendant has

the opportunity to show the jury that it was less and even the opportunity to show the jury that it was substantially less and that the Government failed to prove a substantial tax was due.

I will allow it.

I have not seen any criminal case. I shepardized Dizenzo and just found a tax court case that referred to Dizenzo. Nothing else.

MR. RYAN: I would like to point out --

THE COURT: If you have a criminal case in point that says the burden -- it's the Government's burden to prove -- and I assume when you say "prove," prove beyond a reasonable doubt -- that this constructive dividend comes out of earnings in profits, I would be glad to receive it. I have been unable to find it.

I think Dizenzo looks like it, seems to support your position, but on analysis I find it inapposite.

MR. BENDER: You know, Judge, usually I stop looking when I find a Second Circuit court case, because I find --

THE COURT: When you find one in point, you mean?

MR. BENDER: Yes.

THE COURT: That's all right.

MR. BENDER: And in the tax --

THE COURT: I agree.

MR. BENDER: In a tax evasion case, I've always used civil cases which establish the principle. But I can't --

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THE COURT: I think as a general rule it is all right. But I -- specifically, in this case, I don't think it is appropriate.

MR. BENDER: I think really what we're talking about anyway is not Counts 9 and 10 of the indictment because I told your Honor that I quite agree with your analysis before.

We're talking about Counts 2 to 8, inclusive, on the basis of which --

THE COURT: Mr. Bender, I agree with you. If I give my theory to the Jury and I keep all these corporate dividends in the case, as attributable to Mr. Hornberger, commit reversible error, because I have presented a substantial amount of money he received as income and if that were eliminated it might very well bring on another -- bring a different result.

MR. BENDER: I agree, your Honor.

THE COURT: But I also know and see that it has nothing to do with counts 9 and 10.

MR. RYAN: The only thing I wanted to point out was with respect to cases, The O'Rourke case cited in the requests to charge is a criminal case on constructive dividend, supporting that it is a factual question for a Jury to decide.

THE COURT: Well, there is no question it is a factual question. This is a question.

MR. RYAN: Admissibility, that's the point.

THE COURT: That is not the point that is argued. I don't know why the lawyers can't argue the same point.

Mr. Bender is saying this evidence is not admissible and should be stricken from the record. That's what he is saying.

MR. RYAN: That's correct. We say it is admissible.

THE COURT: You are saying once you have the evidence, it is a fact question for the Jury. Of course it is. It's an essential element of the crime charged.

MR. RYAN: I need say no more.

THE COURT: All right. Seat the Jury.

MR. BENDER: Your Honor, before you call the Jury in, could we just get one thing clear?

In view of what Mr. Ryan said about Elpa Builders not being in the case, could I just inquire whether or not the -- any of the extras which the Government claims that Elpa omitted from the return, even though Elpa is not charged in the Count, were those omitted extras charged to

3 Mr. Hornberger under the constructive dividend theory in Counts 1 and 2?

MR. RYAN: No. We did not attribute any Elpa income to Mr. Hornberger.

MR. BENDER: None at all? Very good.

THE COURT: We will work late tonight, gentlemen. Just be prepared to stay.

(Jury present.)

THE COURT: You may proceed, Mr. Bender. Have you completed your cross?

MR. BENDER: I don't remember where we were. I think, your Honor I -- I --

THE COURT: Do you want the reporter to call down and get the last question?

MR. BENDER: I don't think so, your Honor.

THE COURT: All right. Go ahead.

CROSS-EXAMINATION

BY MR. BENDER (Cont'd):

Q Mr. Vilardi, I'm only talking now pr directing this question to your qualifications as an expert.

Withdraw that.

Not to your qulifications, but to your experience and your knowledge of the Internal Revenue Code.

Assume that Mr. Hornberger in receiving the extras money, which he deposited to the corporation and

which he intended to hold for the corporation, as an agent fo the corporations and then return the money to the corporation, would the fact that the momey was retained by him and put in his bank account under those circumstances constitute income to him?

A It depends on what you mean by the term agent.

Q Assume that his intention was to take the extras which were payable normally to the corporation, have it made out to his name, but that he was holding it for the corporation and intending to return it to the corporation.

A Well, in what respect was he holding this money, as a creditor, as a stokholder?

Q Are you going to ask -- if you can't answer the question, just say you can't answer the question.

A I cannot answer the question.

Q But there is a question in your mind provided that there were certain other factors that existed; is that what you are saying?

MR. RYAN: Objection.

THE COURT: Objection sustained.

Q Do you know what an agent is?

A Third-party individual.

Q Is that the definition of an agent?

A You're not letting me continue.

5 Vilardi - cross

Q I won't stop you, Mr. Vilardi.

A It is my understanding that an agent in the context in which you are asking me this question is a third-party individual who is holding funds separate and apart from the main funds of that particular entity.

Q You think, in other words, that -- I withdraw that. But under these circumstances, that I've asked you to assume, if Mr. Hornberger, who is the principal stockholder and the president of Dotal, Horn, Manor and -- Dotal, Horn, Manor -- what's the other?

A Homes.

MR. WOLFSON: Homes.

Q No. I don't want Homes. Oh, and Elpa -- is it Elpa? No. Then it would be Dotal, Manor and Horn, president of the corporations, single, sole stockholder?

A Right.

Q Takes these extra checks wih the intention of returning them to the corporation, holding them for the corporation and in fact does return them to the corporation, would you say under those circumstances he would be acting as an agent for the principal, being the corporations, and he would not be taxable?

MR. RYAN: Objectionable.

THE COURT: Are you asking this witness to

answer that as an expert?

MR. BENDER: If you see any objection to it, I'll withdraw it.

THE COURT: No. I want to know the purpose of it.

MR. BENDER: He's an expert.

THE COURT: Objection sustained.

He's not an expert in tax law.

MR. BENDER: Well, if he isn't, then I move to --

THE COURT: Motion denied. He's here as an expert computing the tax, as I understand it.

That's the way it was presented to the Jury, to tell the Jury how he computed the tax due.

BY MR. BENDER:

Q All right. Assuming the extra monies which Mr. Hornberger directed to be paid to him and which he deposited in his personal account, with respect to the extras relating to Dotal, Horn and Manor, assume that he was acting as an agent for those corporations, intending to return the money and does, what would be the tax computation or would there be any additional tax assuming those state of facts, on that money that Mr. Hornberger recevied; do you understand the question?

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Vilardi

THE COURT: It sounds like the same question but can you answer it?

THE WITNESS: He acted as a creditor. Not --

THE COURT: Objection sustained.

This witness is not a tax law expert. I will allow him to compute the amount of the tax as to each corporation, where the extras credited to each corporation as income. That's within his field.

BY MR. BENDER:

Q Assuming the same state of facts that I gave you, would your computations as reflected in 146 for identification be different for the years 1967 and 1968?

THE COURT: Are you having trouble with the relationshkp of agent and corporation?

THE WITNESS: I.m -- relating between agent and creditor.

THE COURT: Objection sustained.

MR. BENDER: I withdraw that and I now strike out agenct and I say,

Q Assume now that Mr. Hornberger took these extra payments, of those three corporations, deposited them in his personal accounts, as the sole stockholder and president of these corporations, with the intention of returning to the corporations an in fact returns them, would your computation

be different with respect to whether there was any additional income?

A Objection sustained.

MR. RYAN: Objection.

THE COURT: It still asks this witness to express an opinion as to the consequences of the intention between the parties.

MR. BENDER: All right. I'll --

THE COURT: I don't want you to ask any other questions that require him to express his opinion as to the law. If you want to ask him how he would compute the corporate tax if the money went into the corporation, I'll allow that.

MR. BENDER: That's what I will do.

BY MR. BENDER:

Q Assuming this -- what I told you, that the -- Mr. Hornberger directed the payments of the extras from these three corproations to be paid to him, in 1967, deposited them into his own account, in the amounts reflected on the schedule which is 145A and returned them to the corporation, what would be the tax that Mr. Hornberger would owe, if any, on those amounts that he returned to the corporation.

A It appears you are asking me the same question.

Q I'm asking you what the tax is. I'm not asking

you for a legal opinion, calculate the tax for us.

THE COURT: Objection sustained.

MR. RYAN: Objection.

Q And I ask you the same question with respect to the year 1968.

MR. RYAN: Objection.

THE COURT: Same objection. Sustained.

You may ask what the tax would be to the corporations if these were corporate funds that were in the corporation, if you wish.

I know you think you are asking the same question, so when you stare at me like this in blank, I'm just directing you to ask the question that this witness can answer.

I said, he's qualified as an expert to express an opinion as to how a tax would be computed. If you are -- if you ask him a question based on a legal conclusion or an opinion as to the relationship between the parties, and then based on that what the tax would be, you are asking the same question I objected to.

MR. BENDER: I have no further questions.

THE COURT: Anything further?

MR. RYAN: Nothing further.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Next witness.

MR. RYAN: Your Honor, at this time I'd like to offer in evidence 145 and 146.

MR. BENDER: I've objected.

THE COURT: Is that what was objected to and I said that I reserved decision on it?

MR. BENDER: Yes.

MR. RYAN: Yes.

THE COURT: Objection overruled.

It's all -- may I see the exhibits? It's 146, 146A, B, C, and D and the jury is instructed that this is not testimony.

It is a summary of Mr. Vilardi's testimony and isn't intended to give any substance or credi-b91ity to Mr. Vilardi's testimony, but is to act solely as a reminder as to what his testimony is and I permitting it to go before the jury only because it contains many figures that the jury possibly couldn't remember without a guide.

So if you use it correctly, it will be used appropriately.

In other words, this is not the evidence. What

Mr. Vilardi testified to and the cross-examination, testing his credibility, is the evidence.

This just is so that you may recall the figures that he used.

THE CLERK: 146, 146A, B, C, and D, previously marked for identification, now marked in evidence.

(So marked.)

MR. RYAN: I offer 145.

MR. BENDER: May I see it? I don't have a copy.

MR. RYAN: Handing counsel 144.

THE COURT: May I see it?

MR. BENDER: Give it to the Judge. I just wanted to compare it, Judge.

THE COURT: Don't you have copies?

MR. BENDER: No. This is --

MR. RYAN: 145,I don't have a copy.

THE COURT: Any objection to this?

MR. BENDER: I haven't compared it yet.

I would like to.

THE COURT: Do you have any more witnesses, Mr. Ryan?

MR. RYAN: No, your Honor.

THE COURT: Does the Government rest subject to

the rulings on this?

MR. RYAN: It does.

THE COURT: All right.

The jury may be excused.

(The following occurred in the absence of the jury.)

THE COURT: How many homes -- how many purchases are reported here?

MR. RYAN: Ninety-three.

THE COURT: You have all 93?

MR. RYAN: Correct.

This is a summary of Agent Mazella's testimony concerning the allocation of extras.

THE COURT: The allocation of extras?

MR. RYAN: To the various corporations.

THE COURT: Oh. This is not the -- what he characterized as unreported or unstated income?

MR. BENDER: No.

MR. RYAN: No.

THE COURT: This is 93.

MR. RYAN: That's right.

THE COURT: And just refers to the extra income?

MR. RYAN: Extras.

THE COURT: Any objection?

MR. BENDER: I would love to just compare it.

THE COURT: I am sorry. I forget that you didn't see it. I didn't count the number. I don't know anything about the figures.

I assume that they reflect what Mr. Mazella testified to.

MR. RYAN: They do.

THE COURT: Concerning extras.

MR. RYAN: They do. And they reflect the deletion on 144 that Mr. Bender requested.

(continued next page.)

HSf wlp.

MR. BENDER: Your Honor, I have two comments I would like to make with respect to 145.

I would object to the schedule referring to it and the caption "unreported income."

I have no objection if it is made "alleged unreported income."

MR. RYAN: We will write in the word "alleged."

MR. BENDER: That is the first thing.

Then I would object to the inclusion of two purchases listed in the schedule relating to Story Book Manor, for 1967. That is Cari Peters and D&C Schulkind.

The schedule does not reflect what the books showed as to the corporate --

THE COURT: It is what the testimony is.

MR. BENDER: There is nothing in the testimony.

THE COURT: Do you agree?

MR. RYAN: I disagree.

MR. BENDER: Where is it?

MR. RYAN: Where is what?

MR. BENDER: Where is the testimony?

MR. RYAN: I offered it as extras.

THE COURT: Testimony or exhibits that would support that.

You say there is nothing in the record?

MR. BENDER: No.

THE COURT: Can you point to something?

MR. RYAN: Mr. Mazzella testified this was a schedule of all the extras on the 93 jobs, and these people are listed here and these are the amounts and this is the total.

THE COURT: Can you point to it in the transcript?

I assume you have the transcript.

MR. RYAN: I -- Yes, sir.

THE COURT: All right, point to it.

MR. BENDER: Those are the only two I am referring to.

I show this to your Honor. (Indicating.)

THE COURT: It has to have support in the record someplace.

I am trying to recall the problems that we have in determining when a corporation has surplus and earnings and the different theories on surplus and earnings that we have to become entwined in in order to determine whether this was really surplus and earnings.

Very often it depends on how a corporation keeps its books.

MR. BENDER: I will be content, your Honor, if you want to leave the case with counts 9 and 10.

THE COURT: Let me say this, Mr. Bender:

That would be the safest thing to do. I never take the safe road. I am not interested in making a perfect record for myself. It cannot be any more. I have been bloodies more than once. I do not care. I make rulings on what I believe.

Very often, I say to the Assistant, "I think this is going to do no good and you are taking a risk," but they insist on it.

MR. BENDER: I was thinking -- I wasn't thinking that you would be doing what you did not think was the right thing, but there is a lot of persuasive force to the argument that we are advancing. There is sufficient basis to do it, particularly since it does not throw out the Government's case.

THE COURT: If I were standing where you were, I would make the same argument. I do not know if I would have as much faith in it.

I rule as a matter of evidence is it admissible, and very often, it depends on what kind of foundation you have.

Does it bear on the issue -- Not whether it's the ultimate issue -- but whether it bears on the

issue. I see this as a ruling on evidence.

I just say where a corporation for two years has shown taxable income, sure there's a possibility -- even showing taxable income, -- the taxable income might disappear through some kind of charge against it. I realize that.

MR. RYAN: Page 509, your Honor.

"Now for Story Book Manor Corporation, can you state your opinion?

"Answer: Yes, I can.

"Question: How much?

"Answer: Since 1967 $11,241.35," which is the precise total including Peter's and the other.

THE COURT: What else does he say about it? I do not know when you stopped and when you started looking at the exhibit. What is the precise total?

MR. RYAN: This schedule has that total of the extras.

THE COURT: Certainly does.

MR.BENDER: It has the extras, but it does not have what the corporate books show --

MR. RYAN: I am offering it for the extras.

THE COURT: Is that the only place where the extras are shown?

MR. RYAN: Exhibits 14 through 107.

THE COURT: Do they show Peter's and Schulkind's

MR. RYAN: Yes.

THE COURT: May I see it?

MR. RYAN: Absolutely, 44 and 45.

45 is a check from Peter's for $943.15.

Exhibit 45 is a check for $2260, which are the amounts stated in the schedule.

(Document shown to Court.)

THE COURT: Do you agree it is there, Mr. Bender?

MR. BENDER: Yes.

THE COURT: Do you agree, then, it is proper?

MR. BENDER: Well, it is the only one where the column under the corporate books -- what the corporate books reflect, is not listed.

I thought in view of that the extras are meaningless unless you indicate what the total amount of income is as reported on the corporate books and records as to that purchase.

THE COURT: I will allow it. I will instruct the jury it is only for the purpose of being a summary, but in every case where it says, "unreported income" insert "alleged."

Will you do that now to Mr. Bender's satisfaction, or if you want to do it yourself,

Mr. Bender, you may.

MR. BENDER: I'd rather have Mr. Ryan do it.

(Pause.)

MR. RYAN: I hand you 145. Would you please look at it?

(Document shown to counsel.)

MR. BENDER: Not that way.

THE COURT: In that Dicenza case, it is strange that the Government wanted to assess Dicenza for the full amount of his normal income, which is the theory I have -- and I am still not clear on how the Court determined that only if it is embezzled money can it be declared as normal income -- but it was Dicenza who argued it was a constructive dividend.

He was saying, "Charge me as a constructive dividend and not with normal income."

MR. BENDER: Could it be just erased and put in?

THE COURT: May I see it?

(Document shown to Court.)

THE COURT: You mean the alleged isn't big enough?

MR. BENDER: It is just inserted.

If you think it is satisfactory, it is all

right with me. If you think it is not fairly presented -- it is different with the others -- I am willing to erase it and write it in.

MR.BENDER: I don't want you to do that.

THE COURT: We like our litigants to be satisfied if we can possibly satisfy them.

All right, I have altered it. I hope it is satisfactory. Show it to Mr. Bender.

(Document shown to counsel.)

MR. BENDER: Thank you, your Honor.

THE COURT: Has the other exhibit been admitted?

THE CLERK: It has.

This one here has not.

THE COURT: Are there any motions?

MR. BENDER: Yes, your Honor.

I haven't gone over the figures in the schedule.

THE COURT: If there are any errors, call it to my attention. If it is not supported by the truth, it will be altered.

THE CLERK: Government's exhibit 145, previously marked for identification, now marked in evidence.

(So marked.)

THE COURT: Are there any motions?

MR. BENDER: Yes, your Honor.

Firstly, I make the general motion that the Government has failed to prove by the standards applicable in this circuit beyond a reasonable doubt, the allegations set forth in each of the counts in the indictment, counts 1 through 10.

In particular, I would like to state the Government has failed to prove that Mr. Hornberger received a constructive dividend in 1967 and 1968 from Dotal, Manor and Horn Enterprises, the income from which the Government alleges was omitted as reflected in counts 1 and 2 and ask that the judgment for acquittal should be granted on counts 1 and 2 -- or at least that the income alleged to have been omitted in counts 1 and 2 should be scaled down to reflect what might be the income alleged to have been omitted, other than on the theory of a constructive dividend.

With respect to count 5, which is the charge that defendant attempted to evade the Dotal Corporation income tax for 1967, representing a small amount of $1100 in taxes, I think the proof is clear the extra income which the Government says Dotal should have reported, really was not income of Dotal -- assuming it was income -- but the proof is clear that

all of these purchases, together with the main sale, the extras, were purchased not from Dotal but from Horn Enterprises.

I would say that the Government has failed completely with respect to count 5.

THE COURT: I would like to rule on these motions as you go along. They are different theories.

MR. BENDER: I am sorry.

THE COURT: Motion as to counts 1 and 2 is denied. I have already ruled that the evidence of constructive dividend is admissible.

On 5, the motion is denied. I do not think that the fact that Horn had title -- I shouldn't even say title -- contracted and conveyed the property is determinative as to who received the income.

The books of Dotal say Dotal received the income. I can think of any number of methods and devices used by an individual to convey income received from one corporation was received by another.

There is no reason to suppose that that was not done in this case, in light of the records of Dotal.

The very least I would say is that the Dotal books are admissions against that very challenge.

Dotal says, "I have received the purchase price," and I think it does flow that Dotal would have received the extras.

MR. BENDER: That's assuming that there was proof that the Dotal books said so.

All we had was one witness who said so.

When I showed him the books, he couldn't show it.

THE COURT: I thought that the books of Dotal showed the deposits of advances on these purchases and receipt of other money.

MR. BENDER: I don't think there was any such evidence, your Honor.

THE COURT: What do you say about that, Mr. Ryan?

MR. RYAN: The Dotal books show that that particular job was reported in its income -- the cash received from that particular job was deposited into the bank account.

THE COURT: How about the purchase price in the settlement of the title with the purchaser, wasn't that deposited into Dotal?

MR. RYAN: According to the Dotal records, the proceeds from that sale were deposited into the Dotal bank account.

THE COURT: That is what I thought.

I think it is irrelevant -- not irrelevant -- It might be relevant. You might argue it to the jury.

MR. BENDER: It is not true. This is the failure of the Government's proof. They haven't proved it. It is a simple matter, take the books and records. I tried to point it out to Mr. Mazzella, but he said he couldn't read it or wasn't familiar with it.

MR. RYAN: Mr. Vilardi sat down with Mr. Canale as to the corporate books and records, and Mr. Vilardi was told by Mr. Canale -- was shown the books and records -- that that job is a Dotal job.

THE COURT: Point it out in the transcript, please.

(Pause.)

THE COURT: Where are the Dotal ledger books?

Any of the closing statements show where the money went?

MR. BENDER: They all show that they went to Horn.

MR. RYAN: What buyers are we talking about?

MR. BENDER: George Cummings and Seidner.

MR. RYAN: Page 412 --

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THE COURT: 415, you mean.

Where does it discuss the receipt of the monies by Dotal?

Where is the Dotal ledger book?

MR. RYAN: We are examining it right now.

THE COURT: Point out where these purchases are listed as income to Dotal.

(continued next page.)

1pm

MR. RYAN: The Dotal book we have does not cover the period of time. This books was produced by the defendant.

THE COURT: Excuse me, please. All right. Go ahead, Mr. Ryan.

MR.RYAN: Exhibit 132, the ledger book produced by the defendant following the Government's demand at pre-trial conference, does not include the period 1967.

THE COURT: All right. So that is why you do not prove it.

Tell me how you do prove it?

MR. RYAN: Because the witness examined the '67 records with Mr. Canale, as he testified to, made a list of these jobs on the worksheets which are marked for identification, and which Mr. Mazzella relied on to attribute those extras to Dotal on those jobs.

THE COURT: Where is it in the record? I don't understand that. Where does it say that Dotal received the money? That Canale told him that?

MR.RYAN: Correct.

THE COURT: That's all?

MR. RYAN: No. It was an examination of the records. It was under this procedure.

THE COURT: Which records? Which books? Books that aren't here?

MR. VILARDI: That is correct, your HOnor.

MR. RYAN: Books that Mr. Canale had at the audit with Mr. Vilardi.

THE COURT: Are those books the books that Mrs. Coletti checked, cash books?

MR. RYAN: No.

MR. VILARDI: No.

THE COURT: Where are the books now? Are they lost? Destroyed?

MR. RYAN: We don't know.

MR. BENDER: What books? The books are here.

MR. RYAN: The '67 ledger.

THE COURT: Mr. Hornberger, I told you before, you have two lawyers and I have enough trouble dealing with the two lawyers.

MR. VILARDI: If I could make a statement, your Honor?

THE COURT: I want to find something in the record that supports the count. That's all.

MR. RYAN: Mr. Vilardi testified that he saw with his eyes, the books and records of the Dotal Corporation with Mr. Canale, that he made a list from an examination of those records of the income

reported for every job on the Dotal tax return and that list is marked for identification.

He testified that it's an accurate list of his examination.

THE COURT: Where is the list that was marked for identification?

MR. RYAN: 115.

THE COURT: Haven't you got the bank statements of Dotal?

MR. RYAN: Yes, and they conflict.

THE COURT: Don't they show that the proceeds of the sale at the time of closing were deposited in that very amount to the Dotal account?

MR.RYAN: No. The bank statement doesn't show where the proceeds went.

MR. BENDER: Checks were made out to Horn Enterprises, Judge, according to the closing statement.

MR. RYAN: The closing statement doesn't show where the money was deposited and reported as income on the tax return.

THE COURT: The bank statements do.

MR. BENDER: Sure.

THE COURT: If Dotal did not receive the money, then Dotal did not get the money.

MR. RYAN: Dotal did receive the money.

THE COURT: How? Where?

MR. RYAN: According to the examination of the Dotal books by Mr. Vilardi, with the accountant for the corporation Dotal, Dotal listed -- the jobs we're referring to, shown on schedule 115F.

THE COURT: May I see 115F?

MR. RYAN: Surely.

We are talking about George, Cummings --

MR. BENDER: Seidner.

THE COURT: And Seidner.

MR. RYAN: And --

THE COURT: All right. Show me the testimony with reference to this list. Find it.

MR. BENDER: I think I can help you in that, your Honor, if you want me to.

I think he's just said that what Mr. Ryan said, that he sat down with, I think, Canale or something.

MR. RYAN: Well, it's on page 414 and on 415, this list was marked. And this is following the witness' testimony about how --

THE COURT: 414?

MR. RYAN: About how these --

THE COURT: First mentioned on 415, and the exhibit was marked.

MR.RYAN: Correct. But that's following -- I marked a series of schedules for each corporation, that this witness prepared, based on his examination of the books and records with Canale. That procedure is set forth, begins at 412 and follows through.

THE COURT: Where is the testimony, aside from just a list marked for identification, that Dotal got the proceeds of Cummings, George and the Seidner sales?

MR. RYAN: Okay. Page 399.

THE COURT: All right. Now, ultimately the bank records were introduced into evidence; right?

MR. RYAN: Right.

THE COURT: Let me see the bank records. Do they show that CUmmings, George and Seidner purchased from Dotal?

MR. BENDER: No. From Horn.

MR. RYAN: No.

MR. BENDER: All from Horn. Closing statement, contract, bank records.

THE COURT: Mr. Vilardi said that he sat down with Canale and reviewed various records and assigned certain job numbers to certain corporations. His testimony is that he correlated these job numbers to various buyers who bought these respective houses,

using third party records.

Then we learned the third party records were the bank records.

MR. RYAN: Correct.

THE COURT: So nothing in this records that shows he got that information from any business records or from any bank records, business records of the corporations or bank records.

MR. RYAN: Your Honor, as it says at page 399, this witness testified that he sat down with Mr. Canale with respect to income of the corporation. He examined the books and records with respect to the income of each corporation.

As he testified --

THE COURT: He examined the books and records with respect to each corporation?

MR. RYAN: Correct. With Mr. Canale.

THE COURT: Where does he say that I saw on the books and records -- apparently books and records that are no longer available -- that Dotal received the proceeds of Cummings, George and Seidner?

MR. RYAN: No.

THE COURT: Where does it say that?

MR. RYAN: It doesn't say that. The presentation wasn't made that way.

THE COURT: All right. Wasn't made that way. I do not care how it was made. There has to be evidence to sustain the proof that -- or the fact that the proceeds of the sale of Seidner, Cummings and George went to Dotal, doesn't it?

MR. RYAN: I'll offer into evidence 115F then, the schedule that the witness prepared from examination of the corporate records.

THE COURT: He prepared this from the corporate records? I just thought I heard you say he did not. He got in touch with Canale?

MR. RYAN: Yes.

THE COURT: And CAnale referred him to bank records.

MR.RYAN: No.

MR. VILARDI: No.

THE COURT: Did you see on the corporate records that Dotal got the proceeds of the Cummings sale and the Seidner sale and the George Sale?

MR. VILARDI: No, your Honor.

THE COURT: Of course you --

MR. VILARDI: I saw the job numbers.

THE COURT: Where?

MR. VILARDI: On the general ledger and on Mr. Canale's trial balance and other related work

sheets.

THE COURT: Is the job number on the general ledger there?

MR. VILARDI: There are job numbers on this general ledger here.

THE COURT: Can you identify the job numbers as Cummings, George and Seidner?

MR. VILARDI: No, you cannot, your Honor. This was one of the problems.

MR.BENDER: Can't because they're listed in Horn.

MR. VILARDI: None of the corporate records show the name of the buyer. They only show job numbers, your Honor.

MR. RYAN: How did you determine that the job --

THE COURT: Wait now. I am not going through another trial. I just want to know the consequence of it.

MR. RYAN: All right.

THE COURT: All that happens here is I find that there is no evidence on which the Government can argue that the extras out of the George, Cummings and Seidner houses must be credited as income to Dotal.

That is all.

MR. RYAN: Well, we respectfully --

THE COURT: That does not dismiss the count. It is still a question of fact as to whether there still is proof that there is substantial income that was not reported.

MR. BENDER: No. That's the only three. It's $5400. These represent -- These represent the three extras.

THE COURT: I do not know.

MR. BENDER: A complete failure of proof on the count.

THE COURT: Mr. --

MR.BENDER: I think.

THE COURT: Mr. Ryan submitted 115F, which consists of 8 names, Almaras, George --

MR.BENDER: Not for 67. 67 or 68?

THE COURT: Wait a minute. The caption is obscure.

MR. BENDER: 67 is only three.

THE COURT: Look, Mr. Bender, I am just telling you that Mr. Ryan submitted this 115F, and on that page I see Seidner, George and Cummings.

MR. BENDER: That's correct.

THE COURT: Are you saying that the only sales

in 67 by Dotal were Cummings, George and Seidner?

MR. BENDER: Where the Government has charged extras.

THE COURT: Yes. Is that true?

MR. BENDER: That's all, yes. That's all they charged. With one exception, I think. There is one of -- I think that's the three. With Almaras. Is that Almaras?

MR. RYAN: Almaras, $69.

MR. BENDER: $69.

MR. RYAN: Right.

THE COURT: Is that true?

MR. RYAN: That's correct. Four transactions.

THE COURT: What proof have you that they failed to report substantial income for 1967, if you eliminate George, Seidner and Cummings?

MR. RYAN: Well, it's $69, I wouldn't consider.

THE COURT: No.

MR. RYAN: Of course not.

THE COURT: Then you have no proof in the record to support that charge.

MR. RYAN: Well, the proof consists of this witness' identification of the Cummings job as reported in Dotal's records. That is based on his examination of the Dotal records, attributing that

job number, the three jobs, to income as the corporation's own accountant showed him.

THE COURT: Mr. Vilardi says they were job numbers. He could not identify jobs with the individual purchaser.

MR. RYAN: He could, your Honor, with the other documents.

THE COURT: Did he say so in the record?

MR. VILARDI: Other documentation I could, your Honor.

THE COURT: Did you say anything in the record that identifies the job with the name?

MR. RYAN: Hold it.

THE COURT: You have to have proof to support a charge.

If there is any question, Mr. Ryan, I will call a recess and you can run through the entire record and point anything out to me.

MR. RYAN: I think I'm close to it.

THE COURT: Well, give it to me when you actually have it.

MR. RYAN: Pardon me?

THE COURT: Give it to me when you have it.

MR. RYAN: I think at 452, the witness begins to explain how he arrived in his schedule --

THE COURT: Mind you , his analysis must be based on evidence, too. You are starting with the wrong premise. He expresses an opinion. That opinion is worthless unless it's supported by evidence in the record. So show me evidence in the record where these jobs were sold by Dotal.

MR. RYAN: All right.

THE COURT: His opinion that the extras were -- flowed from the sales by Dotal is valueless, unless there is something in the record which indicated that Dotal sold these buildings.

MR. RYAN: Well, perhaps this would be an appropriate time, then, to call a short recess and let me line it up.

THE COURT: All right. Let me hear any other motions you have. You are up to 5. We ruled on 1, 2, and 5. I mean, 1, and 2. Decision reserved on 5, to give the Government the opportunity to point out the proof to support the charge.

(continued next page.)

MR. BENDER: Count Eight, your Honor, is the count which charges the defendant with evading the tax on Horn Enterprises for 1963 in an amount of a hundred dollars. I would say, as a matter of law, the count should be stricken, because it's just a de minimis amount.

I would say, further, that the proof in the record so far indicates that one of the extras claimed to have been omitted by Horn Enterprises for 1968 is a -- the buyer Hughes. The records uncontradictedly show that there was an over-reporting on the purchase price of the sale of that house by $1395.

THE COURT: You know, all during the trial I have listened to the over-reporting and where you show that they over-reported $3,600, while the extras were $432, and I do not get the point at all. You know, if it happened to be the exact same amount, by a pure coincidence, I would say you have a beautiful argument.

MR. BENDER: No. This is a tax case. If I -- Judge, suppose I took -- I didn't take deductions which were --

THE COURT: That does not prove that they failed -- that they did not fail to report the extras. It may only prove that there was other income that would have offset it and, therefore, no substantial tax.

MR. BENDER: That's right. That's exactly my point.

THE COURT: Your questioning seemed to indicate to the jury that in that overpayment there must have been the extras paid. Or else, where does the other money come from?

MR. BENDER: Isn't that a proper inference, that it could have picked up?

THE COURT: Well, maybe with you.

MR. BENDER: Not with you?

THE COURT: No.

MR. BENDER: You mean, if we showed that we picked up on our books a thousand dollars more income than the closing statement shows we received for the sale of the house and the Government says we didn't report $300 in extras, why isn't it a fair inference that we picked up the extras?

THE COURT: Do you want to know the fair inference is that I make? Everybody draws fair inferences differently. You are an advocate.

A fair inference is that would suggest sloppy bookkeeping or -- which was not accepted by the expert, and he may be right and -- I will stop there. I am not going to --

MR. BENDER: All I am trying to tell you is

3 this, Judge.

THE COURT: Are you going to charge me with helping the Government if I tell you?

MR. BENDER: I think the Government has learned a good deal here and --

THE COURT: No.

MR. BENDER: Judge, I've learned a good deal, too.

THE COURT: I have been under conscious restraint here.

MR. BENDER: We both have learned a good deal and we appreciate your suggestions.

THE COURT: Look, I know enough about builders to know that until they get their advance, they need money pretty badly, the average builder.

MR. BENDER: Judge, that's got nothing to do with this case.

THE COURT: Wait a while now. Sometimes when they're in construction, a certain corporation, instead of depositing money into the corporation, they might, by transfer -- usually the check is made directly to the corporation -- transfer money out of the corporation into another corporation. They might charge it against the particular job.

Anothing thing that's done are there are

4 certain costs, like fees, title fees, brokerage fees, to get the mortgage.

MR. BENDER: Sure.

THE COURT: That some other corporation might have paid that, could better afford to pay it, and then when the purchaser is charged these fees back, it comes into the corporation. That is one way.

MR. BENDER: But you see, what you are doing is bringing your experience outside of the courtroom --

THE COURT: No. That is why I do not want to say anything. The point is this.

MR. BENDER: A lack of proof.

THE COURT: The point is this. When you tell me that it is -- that the reasonable inference is that when there is on the books what appears to be an overpayment on a particular job, mind you, and you see there are underpayments on others, so it wasn't a consistent practice and that that overpayment might possibly represent the extras received and then in the surrounding circumstances, mind you, I find that there is a deposit for the very amount on the day of closing in Mr. Hornberger's account, and you ask me to assume that that extra, that extra money, were the extras for the job, I say, maybe you would assume that but I find it hard to take.

I would never -- that would not be the inference I would make.

MR. BENDER: But --

THE COURT: You asked a question. I gave you the answer.

MR. BENDER: What I am trying to say -- Mr. Wolfsont points out -- I'm sorry, your Honor.

THE COURT: All right. Let's go on to the next count. We are talking about the failure to pay a hundred -- $119 or $120.

MR. BENDER: 109 dollars and one penny.

THE COURT: I do not care about the difference but -- you know, good lawyers for some reason are bad mathematicians, and I am trying to tell you how bad a mathematician I am. But if you deduct $104 --

MR. BENDER: $119, excuse me.

THE COURT: All right.

MR. BENDER: O.K.

THE COURT: $119.

MR. BENDER: I'm not a math major.

THE COURT: Do you agree that that is not substantial, as a matter of law?

MR. RYAN: If this --

THE COURT: What was the gross income of this corporation on your schedule?

6 MR. BENDER: The gross?

THE COURT: For 19 --

MR. BENDER: I don't have the tax return here.

THE COURT: I've got it on one of these schedules --

MR. RYAN: It's --

THE COURT: This is --

MR. BENDER: No.

THE COURT: Horn?

MR. BENDER: It doesn't have the gross income. The gross income I think is much more substantial.

THE COURT: Horn.

MR. BENDER: I think Mr. Mazzella, do you have the corporate tax return there?

THE COURT: Well, if you do not have it, I have it.

MR. BENDER: We have it here, Judge.

THE COURT: The gross income is 50,000 and eight dollars, is reported on the return, and the corrected is 51,000, but that's -- it's more than a difference of $119.00.

MR. BENDER: Not according --

THE COURT: There was a deficit.

MR. BENDER: Not according to the indictment.

THE COURT: Well, according to the schedule,

they paid no tax.

MR. BENDER: According to the indictment, they did. Oh, excuse me. It was a taxable loss of $104. You're right.

THE COURT: So now we are going to 300 -- 104 plus --

MR. BENDER: No. Is it 300?

THE COURT: The tax on the diference would be 100 and -- $328 and some cents. So it's $328 and some cents.

MR. BENDER: Out of a gross income of $50,000. I think we're stretching this beyond anything that's imaginable.

THE COURT: This is not a cooperative effort. It is the Government who is prosecuting. You said, "we're stretching.

MR. BENDER: I did not mean that.

THE COURT: This is not a cooperative effort, you know.

Mr. Ryan?

MR. RYAN: If this was a case involving two counts in that corporation, I would agree. But the Government's case here is that this was part of a tax scheme where this defendant was operating his business under various corporations, and that he

was engaging in this diversion of money with the intent to evade the corporate taxes on his corporatio and for that reason I think that the jury should consider this count together with the other counts in order to make its determinations on the tax scheme.

(Continued on next page.)

THE COURT: Well, it may very well be the wrong reason, because the count has to stand on its own. If it is bad as a matter of law, it is bad.

That is not to say you cannot introduce evidence to show that this was a course of conduct.

MR. RYAN: Of course, otherwise I would say it would be insubstantial --

THE COURT: That is something else.

Do you agree as a matter of law claiming that the failure to report $328 as taxes would not be substantial?

MR. RYAN: Before I give that answer, may I have a moment?

THE COURT: Yes.

(Pause.)

THE COURT: Who is the gentleman you are talking to?

MR. RYAN: He is from the Regional Council's office.

THE COURT: Are you a lawyer?

MR. RYAN: He is.

THE COURT: I wish you would give me a brief on whether proof of a constructive dividend is admissible without proof of the entire history of the corporation's activities to make a determination as

to whether the monies claimed to be a constructive dividend comes out of surplus or earnings.

Mr. Bender was the only one that cited a case to me that seems to support his position, but I do not think it does.

MR. BENDER: The sections of the Treasury regulations do.

THE COURT: The one case he cited, which I do not think has any application to the ruling of the admissibility of evidence, is DiCenzo against the CIR, 348 F. 2d, 122, 1965.

If you find anything to the contrary, before I charge the jury, I would appreciate it.

All right, now that you have consulted with the gentleman.

MR. RYAN: We are dealing with Count Seven --

MR. BENDER: Eight.

THE COURT: Count Eight.

MR. RYAN: The count also states that the defendant failed to report taxable income, apart from the tax due.

THE COURT: It is based on the failure of the corporation, by Mr. Hornberger, to report substantial income that carried a substantial tax liability.

MR. RYAN: The count states that he failed to

3 report the taxable income by a certain amount --

THE COURT: Through the corporation.

MR. RYAN: Correct.

THE COURT: So it is the corporation's income that counts, right?

MR. RYAN: Correct.

I don't have at my fingertips the statement of taxable income reported and the amount of taxable income he should have reported.

THE COURT: It says that he alleged the taxable loss of $104.92, whereas he actually -- actually the corporation had a taxable income of $925.18.

MR. RYAN: Your Honor, I won't concede it. I will ask your Honor to rule as a matter of law.

THE COURT: Standing by itself, I think Count Eight must be dismissed as a matter of law because the amount of taxes claimed by the Government to be due is insubstantial.

Again, I say that does not deprive the Government of proving what Mr. Hornberger did with reference to Horn Enterprises and it is in the case and I won't strike that testimony.

MR. BENDER: I hope that my silence is not construed to be an agreement with your Honor's ruling.

THE COURT: You have made the motion to strike all testimony that relates to this transaction and cited United States against Deton, among others.

MR. BENDER: Yes.

THE COURT: Go ahead.

MR. BENDER: The specific reason -- the theory on which it would be admissible, would be a similar act; is that right?

THE COURT: Similar plan and scheme. That is why it should not be stricken.

Why should there be a break in the chain? The Government said 150 some-odd thousand. Why should you be able to go to the jury and say it is wrong? It is part of the scheme. I am giving you the Government's position. I am not amking that determination.

MR. BENDER: I don't think I have anything specific with respect to any of the other counts. I do want to state, however, that I think -- based upon the Government's proof which now indicates the admission by the defendant -- the purpose for which he instructed the buyers to give checks to him and which he deposited with the intention of returning it to the corporation and did in fact --

THE COURT: As a loan -- I said as a loan.

MR. BENDER: There has been no proof that the defendant directed or in any way advised, instructed or was aware of the fact that the monies that he put back were credited to the stockholder's advance account. There is no proof that he had any control or supervision over the books and records, so that he would be chargeable with notice.

In other words, there has just been no proof in this record that what happened here was in any way due to any fault of this defendant, which it could be said that there was any wilfulness on his part, even assuming the omission of the extras of income of the corporation.

I think the mere understatement of income is insufficient.

THE COURT: Of course it is.

You are recalling all those cases that say that.

I think the Government has shown at least on its prima facie case that this defendant knowingly and wilfully attempted to evade and defeat a large part of the income due the Government for the respective years, by filing false returns on the part of the corporation and on his own behalf for the years 1967 and 1968 by failing to report first to

the corporation that the extras were income and then to himself as a constructive dividend from those corporations, and it is particularly true of Counts Nine and Ten, the Subchapter S Corporations.

I might say the jury can fairly infer that the books of account were kept in accordance with Mr. Hornberger's instructions. I haven't gone into the tax returns of the various incorporations to show when he signed the return for 1968 whether there were any loans payable to him from the corporation, but that would just be gilding the lily, if it were there.

(Continued on next page.)

4/2pm

MR. BENDER: You mean on the balance sheets of the corporate returns?

THE COURT: Yes.

MR. BENDER: Oh sure, there are liabilities to stockholders, reflected, which would equal about $248,000 that we put in to evidence as a schedule.

THE COURT: I say I am not even referring to that.

MR. BENDER: He just merely signed the return.

THE COURT: I know.

The law is that if a man can read and write English, it is assumed that he read an understood what he signed. You can argue that he didn't. That is a question of fact for the jury.

The motion to dismiss all the other counts, except 8, is denied, and I will reserve decision on 5. I will give you a few moments and then I will continue with the case.

Let's get going.

MR. BENDER: You don't mean dismiss, you mean motion for a judgment of acquittal is granted.

THE COURT: Motion granted.

Do you have something else?

MR. RYAN: I could make a presentation when you are ready.

MR. BENDER: I said when you said motion to dismiss 8 is granted, could that be in the form of a judgment of acquittal?

THE COURT : Yes, motion for judgment of acquittal is granted.

MR. BENDER: Are we having a recess?

THE COURT: I do not know.

MR. RYAN: Perhaps we ought to.

THE COURT: Let us make this a five minute recess. If you have nothing, I will dismiss 5.

MR. RYAN: I understand.

(Recess taken.)

MR. RYAN: Let me point out what is in the record.

With respect to Cummings, we have the bank statement which has the buyer's name and the job number.

THE COURT: All right, what job number do you have on the books of Dotal?

MR. RYAN: There isn't a page for the year 1967 in that ledger book.

THE COURT: I thought Mr. Vilardi said he had job numbers, but couldn't identify them with a name.

MR. RYAN: The corporate books --

THE COURT: What does that say?

MR. RYAN: It says Cummings, Job number 24.

THE COURT: What is the name of the corporation?

MR. RYAN: According to the bank statement, Horn Enterprises.

Now, Mr. Vilardi testified that for the purposes of attributing jobs to income, he sat down with Mr. Canale and he asked for the job numbers.

Under the Dotal Corporation, the records showed job number 24, was attributable to Dotal's income.

THE COURT: Where is that in the testimony?

MR. RYAN: It's in the schedule which he testified to, which is marked for identification.

The testimony is that he prepared that schedule from looking at the corporate books and records and made a notation of it, job number 24, Dotal Corporation, and I will offer the schedule into evidence.

THE COURT: You said there is no schedule for Dotal in 1967.

MR. RYAN: There is no record.

Of all these ledger books, there is one set of papers missing. It is for the year 1967, Dotal.

Every other ledger book has sheets for both years, except for Dotal.

When Mr. Vilardi was examining the corporate books --

THE COURT: He saw the page that is now missing?

MR. RYAN: He saw job number 24, yes.

THE COURT: He saw the page, job number 24, on a 67 entry for Dotal; is that what you're saying?

MR. VILARDI: That's correct.

THE COURT: Did you testify to that?

MR. VILARDI: I don't know what I testified to right now.

MR. RYAN: Did he testify that he saw the corporate books? The answer is "yes."

THE COURT: That he saw this particular entry?

MR.RYAN: His testimony was not geared to the 93 transactions.

THE COURT: If you are asking me to accept secondary evidence --

MR. RYAN: I will.

THE COURT: Not on this basis.

The secondary evidence isn't that he saw anything in the record that since has been lost or destroyed, but rather he discussed something which Canale and he decided. That is all these records show.

MR. RYAN: He just didn't discuss it. He saw the entry in the record.

THE COURT: That is not in evidence. I'm sorry, that is not in the evidence.

MR. RYAN: What is in the record is that he looked at the corporate books and prepared schedules of job numbers for each corporation. It is marked 115F. He didn't utter the words for each job number.

THE COURT: I find nothing to support the charge in count 5 and the motion is granted for a judgment of acquittal.

MR. RYAN: I might say I have received no explanation why these pages are missing and I expect one.

THE COURT: You don't get one.

If you wanted to introduce secondary evidence, there is a foundation that you must lay. That is to show that the records were lost or destroyed, then I would take testimony as to what those lost or destroyed records were. That was not the procedure you used.

MR. RYAN: I will move to reopen to establish that fact.

THE COURT: If you want an advisory opinion, I will tell you I won't do it.

MR. RYAN: All right.

THE COURT: Seat the jury, please.

(Jury present.)

THE COURT: I have just ruled as a matter of law and dismissed count 5 and count 8 of the indictment.

Count 5 charges that Mr. Hornberger filed a tax return as president of Dotal Building Corporation and in effect, failed to report as income, certain extras for the year 1967.

I found that there was a failure of proof as a matter of law, and dismissed that count. I expressed no opinion by that ruling as to the other counts. All I said as to the other counts, it presents a fact question to be decided by the jury.

Now, as to count 8, I dismissed count 8 because as a matter of law, the Government has claimed in that charge that the Horn Enterprises for the year 1968 failed to include taxable income that would have given the corporation a taxable income of $925.18, instead of showing a loss of $104.82.

I found that that claim was insubstantial as a matter of law.

In other words, I will charge you, when we come to it, that the Government must not only prove

the defendant knowingly and wilfully attempted to evade and defeat income taxes due the United States, but that it was to a substantial amount, an amount of taxable income -- and the attempt was to defeat a substantial amount of tax due.

I just found the sum claimed, $223.89 was not substantial enough.

All right, Mr. Bender.

J A M E S M A H O N , J R ., having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: State your full name, please.

THE WITNESS: James Mahon, Jr.

THE CLERK: Be seated, please.

DIRECT EXAMINATION

BY MR. BENDER:

Q Mr. Mahon, what is your present occupation?

A Assistant Vice President, Chemical Bank of Suffolk.

Q Where is that located?

A Smithtown, New York.

Q In the year 1967 and 1968, what was your occupation?

A Assistant Vice President, Eastern National Bank.

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Q Did Chemical then, subsequently take over the Eastern National Bank?

A Yes.

Q Do you recall whether the corporation, Dotal Building Corporation, Horn Enterprises, Story Book Manor, Elpa Builders, Story Book Homes, had accounts with your bank at Eastern National in 1967 and 1968, if you can recall?

A Yes.

Q Did Mr. Elmer Hornberger have a personal account at the bank?

A Yes.

Q Now, in the year 1967, would you be able to tell us whether the bank would extend credit to Mr. Elmer Hornberger or his corporations?

A Yes.

Q It would?

A Yes.

Q Did he have a line of credit with your bank?

A Yes.

Q Would that be a line of credit without any collateral of any kind?

A Yes.

Q Up until what amount would you say he and the

Mahon - direct

corporations had a credit for, if he wanted to borrow?

A A substantial 5 figure amount.

Q A substantial five figure amount?

A Yes.

MR. BENDER: Would you keep your voice up so the jurors can hear you?

THE COURT: Mr. Shapiro?

(Answer read.)

THE COURT: Between 50 and 99,000?

THEWITNESS: Between 10 and 50,000.

Q How long have you known Mr. Hornberger, Mr. Mahon?

A Approximately 8 years.

(continued next page.)

Q And how did you get to know him?

A Well, I lived in the same town, and through various social functions, and through business connections and affairs, I met him.

Q Had you had occasion during the time that you know him to talk to people in the community, both the banking and the social community, about Mr. Hornberger?

A Yes.

Q Did you ever talk to them about his honesty and integrity as an individual?

A Just in normal conversation.

Q What would you say -- Are you in a position to tell us what his reputation in the community for honesty and integrity is?

A Just from my findings, excellent.

MR. BENDER: I have no further questions.

CROSS EXAMINATION

BY MR. RYAN:

Q Can you tell us the occasion that brought about discussing the honesty and integrity of Mr. Hornberger?

A That would be probably in relation to credit granted through the bank.

Q Did Mr. Hornberger ever exercise that credit with your bank the years 1967 and 1968?

A On occasion.

Q Can you tell us how much he borrowed from the bank?

A I am not prepared with that.

Q Can you give us any idea -- I don't mean to tie you down.

A As I said before, between 10 and 50,000.

Q Did he actually borrow and use the money?

A Yes.

Q Do you know what he used it for?

A Well, money is normally advanced for a particular business, and it is used in relation to that business, either inventory, or in the case of a builder --

Q This credit account was a commercial account for a commercial purpose?

A Commercial and personal borrowings.

Q Do you know if there was monies borrowed for commercial purposes from that account?

A Yes.

Q Can you give us some idea what the amount was?

A As I say, 1967 and 1968, between 10 and 50,000 -- somewhere in that range?

Q For commercial purposes?

A At different times.

Q Mr. Hornberger was a builder -- for his business as a builder, correct?

A I assume that is what it is used for.

MR. RYAN: Thank you, no further questions.

MR. BENDER: I have no further questions.

THE COURT: You may step down.

Call your next witness.

E L M E R E . H O R N B E R G E R , having been first duly Sworn by the Clerk of the Court, testified as follows:

THE CLERK: State your full name, please.

THE WITNESS: Elmer E. Hornberger.

DIRECT EXAMINATION

BY MR. BENDER:

Q Mr. Hornberger, you are the defendant in this case, are you not?

A Yes.

Q How old are you?

A 43 years old.

Q Are you married?

A Yes.

Q What is your wife's name.

A Dorothy.

Q How long have you been married?

A Seventeen years.

Q Do you have any children?

A Yes.

Q How many?

A Four.

Q What are their names?

A Douglas, Kenneth, Linda and Dianne.

Q How old are they?

A Sixteen, fifteen, fourteen and thirteen.

Q Did you ever serve in the military service of this country?

A Yes.

Q When was that?

A From 1954 to 1956.

Q Was that in the Korean War?

A Yes.

Q Where did you see service during that war?

A In Korea in the infantry.

Q Were you an officer?

A No, I was a Sergeant. Platoon Sergeant.

Q How were you discharged?

A Honorably.

Q Now, in 1966, what was your occupation?

A A builder.

Q And besides building, did you do anything else?

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A I was also a land developer, because sometimes a builder does not have the best name -- I developed land and sold it to other builders.

Q And in connection with that occupation, did you operate under any corporate names?

A Yes.

Q What were the names of those corporations?

A Storybook Homes, Incorporated, Storybook Manor, Incorporated, Dotal Building, Incorporated, Horn Enterprises, and Elpa Builders.

Q During 1967 and 1968, where did the corporations build primarily?

A Primarily in Smithtown, Nesconset, Setauket, and the townships of Brookhaven and Smithtown.

Q Now, you were the principle officer of these corporations, were you not?

A Yes.

Q You were the President?

A Yes.

Q Who were the other officers, if there were any?

A My wife.

Q Your wife Dorothy?

A Yes.

Q Did she do any work for any of these corporations

during this period of time that we are talking about, 1967, 1968?

A Yes.

Q What did she do?

A She worked in the capacity of land developing. She would check land, send out -- type of letters, follow up is someone would like to sell the land, and from there, turn it over to me.

Q And what was your function with respect to each of these corporations during this period of time, 1967 and 1968?

A Well, I was in charge of the complete operation, both construction and my office.

I would attend zoning board meetings, planning board meetings, design homes, work in the field along with my superintendents, buy and sell real estate, develop real estate for other builders, and also build my own homes and assist my salesmen.

Q What about the mortgages?

A I would also obtain mortgages from the banks, and keep a rapport with the banks, because we did not use brokers, so subsequently there would be no points paid, or premiums, where the customer would have to pay, and I would obtain the mortgages directly.

Q During this period of time, how many employees

did the corporations employ?

A Basically there would always be two full-time salesmen and two part-time salesmen, at least two supers, two labors and an accounts payable girl in the office, and at least two other girls.

Q During 1967 and 1968, who were the girls in the office?

A Sophie Pace Zeleski, Charlotte Waugh, Vickie Colitti, Constance -- I think -- Hought, Rita Perrin, and we also had different girls for reception, so they may only last for about five or six months before looking for a better job, or just for experience.

Q And Jean Bollman Orientale, did she come in 1968?

A Jean Orientale worked in the land division.

Q How about the subcontractors, did you employ any subcontractors during this period of time?

A Yes, all our work was basically subcontracted out, and direct supervision was from our supervisors, and from myself.

Q We employed at least forty subcontractors, and fifteen supply houses that we'd have to do business with constantly.

Q Now, who is Tom Canale?

A Tom Canale was my accountant -- a CPA and a lawyer.

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Q Did he do any work for the corporations during 1967 and 1968?

A Yes, he kept the books for 1967 and 1968.

Q And did he do anything else for you and the corporations?

A He prepared all corporate returns and my own personal returns for my wife and myself.

Q Now, did you have a system with respect to the corporations whereby income earned by the corporations and expenditures disbursed was established?

A Yes.

fls

(continued on next page.)

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Hornberger-direct

DIRECT EXAMINATION

BY MR. BENDER: (Cont.)

Q And who established this system of mechanics and procedures whereby income of the corporations and expense of the corporations would be reflected?

A My accountant.

Q Who?

A Thomas Canale, C.P.A.

Q How long have you known Mr. Canale?

A I started business in '56. I'm sure he started working -- took over our account in '58.

Q And who instructed the girls in your office as to what records of any transactions were to be kept, if you kno

A I would instruct them to keep the records of transactions within the office.

Q But with respect to the books and records, the entries into the large books or the books of account which we have here, did you have anything to do instructing the girls or Mr. Canale or Miss Paterno?

A No.

Q With respect to that?

A Mr. Canale worked directly with the accounts payble girland they worked hand in hand, along with Miss --

Mrs. Paterno.

Q By the "account books," I am referring to exhibits 128 through 133 in evidence.

Did you know how the records that were kept by Mr. Canale were actually kept and how the income was reported?

A No.

Q Did Mr. Canale always keep your books and records since on or about 1959?

A Yes.

Q Was he competent, as far as you knew?

A I had implicit faith in Mr. Canale.

Q Now, besides Mr. Canale, whom did you employ to keep records of transactions entered into by the corporations during those years, 1967, 1968?

A Sophie Pace Zaleski, Charlotte Waugh, Rita Perenni, Vicky Coletti, Jean Orientale -- Jean Bowman Orientale and I think Constance Hauf and some other girls.

Q Well, why don't youtell us what the functions were that these girls performed? By starting off with an illustration of someone comes in and wants to buy a house, and I'm talking now about procedure only in 1967 and 1968. Could you do that for us, Mr. Hornberger?

A Fine. I'll take a typical example. If say

it was a Wednesday and my salesmen would be off, I would cover for them in the sales pavilion, take a binder off the people, naturally show them the land first, show them the model house, go over any changes that they would like to make, and take a binder from them, deliver this binder to my attorney, Mr. Wolfsont, who entail would contact their attorney to set up a contract of sale.

I would then attend the contract of sale, myself. Sometimes I wasn't available. If I would be on vacation, power of attorney was given to Mr. Wolfsont. I would --

Q Let's assume you attended the contract closing.

A Fine. I'm at the -- I would go to the contract, because people seem to have more faith if they see the actual person that they're going to do business with and because of the background and the long period of time that we've been building, we could talk knowledgeably if they wanted any changes in the house, structurally or any changes that would not be structural.

So consequently, I would feel that it would be my obligation because these people are my bread and butter and I should -- I attended the closings -- the contracts.

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I would attend the contract, go over all changes, which could be -- which were extras or could not be extras, which would be no cost. Someone might want to move a window. We wouldn't charge them anything. They would want a paint job. If a full cellar, full thick insulation, this would all be incorporated into the contract.

I would then bring the contract -- the contract would be signed. We would take a credit report from the people to the bank that we felt would be the most logical to send the application to. Because certain people just could not always qualify for Roosevelt Savings. It might have to be the Dime. It might have to be another bank.

Therefore, I would -- after everything was executed, I would return to my office.

Q What would you have with you?

A I would have a contract, a credit report and hopefully 10 percent downpayment.

Q Would you also have the application for the mortgage?

A Yes. That -- that's the mortgage application.

Q All right. Now, having these papers, what would you do? You went back to the office?

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A I would first give the contract and the check and the mortgge application to Charlotte Waugh. Charlotte would entail --

Q Before you say what she did, did you instruct her what to do?

A Yes.

Q All right. And what did you tell herto do with the contract, with the downpayment and with the application of mortgage and the credit report?

A I told her to read the contract very closely, because there are changes in extras that people would want. She would have to make notations on a card which would be attached to the job folder and then she would make a card for herself.

All changes and extras -- when I say "extras," that is a change, would be sent to the individual contractor with the job number on it. First we would assign a job number to this person.

Q Is that what you instructed -- I am trying to get what you instructed Miss Waugh to do?

A Right. I instructed her. First -- first I instructed her to assign a job number and then to read the contract, make out the card, type up the changes that would be sent to either the insulation man, the painter,

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the concrete, the carpenter, etcetera.

Q Now, Charlotte Waugh had worked for you before 1967; isn't that right?

A Yes. I believe she started in 1965.

Q Are you giving us the procedure that she followed in 1967?

A No. This is the procedure that she -- that she did in '65.

Q In other words, this is the first time you instructed her?

A The first time I instructed her.

Q As to what she did?

A Right.

Q What happened with -- when similar situations happened in 1967? Wasit almost automatic?

A In '67 it was automatic because she was a girl Friday and I could almost leave the office and she could perform these duties.

Q All right. Now, you were saying that you would give her the contract and she would do what?

A She would type -- she would read the contract. She would make up the job -- a job folder, assign a name, because there would be different subdivisions, so consequently there would be -- if it was, say, Sherwood Acres,

we would use S. If it would be Fable Acres, we would use F. If it would be a Story Book Manor, we would just use a regular number. If it would be an off site, it could be a 700 series or an 800 series.

So no matter -- anyone could understand the simple system.

Q And what did she -- what was she instructed to do? What was she instructed to take off the contract and do?

A She was instructed to take off any changes for extras and then record them on a card and then also record them for a record for herself.

Then she would take the contract and give it to Miss Coletti. Then Miss Coletti would read the contract, Vicky would read the contract, to see the sales price, to see if there were any extras in there and to see if we received the true downpayment that was on the -- in the contract and set up some sort of her own record.

Q Now, what did you instruct Vicky to do, and I assume we're talking about 1967 now? Is thatright?

A Yes.

Q What did you instruct Vicky to do?

A To read the contract, to then deposit the money in the bank -- in the bank under the proper

corporation, because there were five corporations, and then return the contract back to Charlotte Waugh, who then -- should I continue?

Q Yes, please.

A All right. Who then -- who then would type up a letter for request -- well, first she would process the mortgage application, send it off to the bank that's necessary to be applied for to, and then she would apply for the building permit, because generally we do not apply for the building permit until we have a contract of sale.

Q With respect to the downpayment, did you issue any instructions to Vicky Coletti as to where she should make the record of that downpayment?

A In the job -- in the job number that it was applicable to.

Q Well, did Vicky have a job file of some kind?

A She had her own records that she kept.

Q Which reflected what?

A The selling price, any extras that were on the contract, that she would take off, and the downpayment.

Q I'm not talking about Charlotte Waugh. I am talking about Vicky Coletti?

A Well, she would have the sales price and the

downpayment because she would have to know when progressive payments came in from the bank because generally itwas set up on a 7-schedule payment, that how much we were entitled to under each payment.

Q All right. Then what happened?

A Well, then Charlotte would -- let's say after everything has been -- she would -- sent it out to the bank, got the building permit, we started building, the house was in frame, she would send a letter to -- well, she would apply for fire insurance because in case -- fire insurance and malicious vandalism from the broker.

She would set her own files up. She would then be instructed to send a letter to the people for the -- if there were any extras, to pay for them, because our contracts stipulated that extras must be paid upon order.

She would later on send a letter -- no. Excuse me. There is -- she would send out an electrical change in the event thatsomeone would want to put an outlet or make a change. We had a regular format where they could make a schematic of their house and indicate where they could do it because primarily a lot of our people were referral people and second home buyers and, therefore, some people -- some things that they didn't get in their first home, they were looking for in the

second home. As Levitt would be, say, a stereotype builder, we would be a custom builder.

Q Now, what instructions did you give to Charlotte Waugh with respect to the extras?

A I told Charlotte to send a letter and request payment. What --

Q On what kind of stationery?

A On the stationery of the corporation.

Q Which corporation?

A Whatever corporation the home was sold in. Either Story Book Homes, Story Book Manor, Elpa, Horn, Dotal.

Q Now, did you ever instruct her what to do with those letters or copy of the letters?

A Yes. She would file them in three files. Her own file, because she would have to follow up tomake sure thatthe people would pay or possibly they may cancel something out. One would be left in the major reading file, which would be accessible to Vicky, say, Rita, Sophie or other girls in the office, even my supers, my salesmen, and she would make one up for me.

So we had three copies in the office.

Q Now, can you tell us during 19 -- just to stop with the procedure in the one case at the moment. In

1967 and 1968, could you tell us what the general practice was, as far as you know, in the selling -- in the contracts which were executed between the buyers and any of your corporations, with respect to extras that were ordered?

If you don't understand the question, I'll rephrase it. Do you understand the question?

A Could you rephrase it, please?

(Continued on next page.)

Hornberger - direct

Q What was the usual practice when extras were ordered? Would they normally, over this period of time, in 1967 and 1968, were they included in the contracts that were of sale, that were actually executed by the corporation?

A They were attached to the contract.

Q Yes.

Well, how frequently on these sales were the extras actually ordered, at the time the contract was entered into and made a part of the contract?

A I would say, from the 93 that I reviewed, there was at least 72, of the Government's records.

Q Now, what was the purpose of giving Charlotte Waugh the contract?

A So that she would know what extra and to who she would have to allocate the work to be done.

Q Now, were there instances where extras were ordered after the contract was signed?

A Yes.

Q Now, how would Charlotte Waugh be advised about that and what instructions would she be given with respect to those extras?

A Well, sometimes the people would stop in on Sunday, because people work during the week and they can't just stop out at all times. They would leave a note with the

salesman and say, "We would like a two-car garage," or say a -- "Seal tab shingles, instead of regular shingles." Or, "two foot extension on the house."

And it would be turned over to Charlotte, who in turn would turn it over to me. I would check it out. She would send out an order -- a letter of authorization, because our office -- and it was a policy -- that no change or no extra would be installed unless there was a letter of authorization. So she had the authority to write the letter of authorization. She would receive it and then place it on the card and in the other files.

Q Did she have the authority to sign your name?

A Oh, yes.

Q As president of the corporation?

A Yes.

Q And when the letter would come in signed by the buyer, was she given any instructions as to where to file that letter?

A Yes. She would file -- she would file the letter in the -- we have a mimeograph machine in the office, so she would make sometimes, three copies of it. She would file it in the job file, for permanent record, in her own record, and I would get one.

Q Now, prior to 1967, were any instructions given

to Charlotte Waugh as to whom the customer should pay the extras to?

A Yes.

Q Were there any different instructions given to Miss Waugh in 1967 in that respect?

A Yes.

Q Now, can you recall when, in 1967, instructions were given to Miss Waugh with respect to the letters to be sent to the customers that varied from your prior practice?

A I would say in the early part of 1967, the policy of my office was changed and instructed Charlotte to make payment -- to request payment for all extras to me, Elmer E. Hornberger.

MR. BENDER: Excuse me one minute, your Honor.

THE WITNESS: It's okay if I lean back, isn't it?

THE COURT: Yes.

THE WITNESS: I have a --

Q When did you say you advised her? In 1967?

A The early part. January, February. In the end of January, February. I don't know exactly the specific date.

Q And what did you instruct her?

Hornberger-direct

A I instructed her to request the payments to be paid directly to me and no longer to the corporations.

Q And did you give her any additional instructions at that time, with respect to the other girls?

A I told her to -- that this would be general policy of the office, and to inform Vicki, to inform all the other girls that this was now the new policy and we will try to enforce it to the best of our ability.

MR.BENDER: Excuse me one minute. I'm just trying to find one exhibit.

Could I have 28, Mr. Ryan, please? Exhibit 28?

BY MR. BENDER:

Q I show you exhibit 28A, which is a letter on Horn Enterprises, dated January 17, 1967 to Mr. and Mrs. Michael D. Sapoli and this has your initials, EEH, colon, small cw; is that right?

A Yes.

Q Who is the CW?

A Charlotte Waugh.

Q And did you sign your name to this letter?

A No. That's --

THE COURT: I cannot hear it and I do not think the jury can.

A (continuing) Charlotte signed here. Her

Hornberger-direct

initials are here.

Q Now, that was a letter requesting -- that was sent out by Charlotte Waugh, requesting the Sapolis to confirm their agreement to buy certain extras; is that right?

A Yes.

Q Were there any instructions in that letter to pay the extras to you personally?

A No. It said -- May I read the letter?

Q Yes, please.

A It says, "Dear Mr. and Mrs. D'Sapoli;

"Please be good enough to forward your check in the amount of $1,885 to cover extras ordered for your new home on job 9, Story Book, at Nesconsett, as all extras are payable upon authorization."

Q But it's your testimony that it was sometime in 1967 that you issued instructions to Miss Charlotte Waugh to change that policy and to direct the buyers to make the checks payable to you?

A Somewheres in the early months of '67.

Q To your knowledge, that was done; wasn't it?

A Yes.

Q I think you have another letter there, which is attached to this group of 28A -- of 28B. Now, this is dated February 14, 1967. It's on the stationery of Horn

Hornberger-direct

Enterprises and this acknowledges receipt of a check for the payment of the extras which was the request contained in the previous letter of January, which you just read to the jury; is that right?

A Yes.

Q And do you know who typed that letter?

A Sophie Pace, and she was acting in the capacity of a bookkeeper at that time.

Q Did you sign that letter?

A No. Sophie's initials are here.

Q She signed your name?

A Signed my name, yes.

Q Now, would you tell the Court and the jury why you issued those instructions requesting that the payment on extras from the buyers be made to you personally, rather than to the corporations to which the extras belonged, or to which the payments for the extras belonged?

A Well, during the latter part of 1966, and possibly the early part of '67, we would have some difficulty. Sometimes people might possibly stop payment on a check because they felt maybe the paint job wasn't right or something wasn't right.

So I consulted and felt that if I collected the extras directly, I would relieve the corporation of the

Hornberger-direct

responsibility for that specific job and they could only move against me, if there was a defect or a complaint.

Q Did you receive payment on these extras according to your instructions?

A Yes.

Q Were there times when anybody else received the payments on the extras, besides yourself?

A Yes.

Q Well, who else received extras?

A On weekends, extras could be dropped off to my salesmen. Vicki could collect extras. Charlotte. Any girl in the office was authorized to collect -- to accept the check.

I mean, if someone comes in with the money, you don't want to send them away, if I'm not there.

Q These would be checks made payable to you?

A Yes.

Q By the buyers?

A Yes.

Q Were there times when you received the payment without Charlotte Waugh being aware of it?

A Oh, yes.

Q What was your policy under those circumstances? What did you do?

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Hornberger-direct

A Tell the girl to issue an acknowledgement of receipt so that we would have a permanent record ourselves, besides the cancelled -- you know, besides the check, or possibly I would initial the man's letter, if he brought it in with him, if there was nobody there. If everybody was on their lunch hour.

Q That would be the letter that he received from the corporation?

A Requesting the extras.

Q In other words, when you received the check directly from the buyer, you notified Charlotte Waugh that you had been paid?

A Oh, yes, because she kept records and she would then have to notify the other girls in the office that the extra was paid because -- so that there would not be any repetition of requesting it again. It would be very embarrassing.

Q Now, what did you do with the checks that you received in 1967 and 1968 on the extras?

A I deposited them in an extra account, in the -- in the Bank of Smithtown and Tinker National.

Q And --

A Also Eastern, but I -- I almost think it's '68, but I would say all three banks.

Hornberger-direct

Q Well, all three banks in what year? In 1967?

A No. I think in '67, there was just two , and in '68 there was primarily Eastern, but I'm not really sure.

Q All right.

A This is the best of my recollection.

Q In any event, you -- in two of the banks, Eastern and Tinker, you had your corporate account there, at the same place, did you not?

A Oh, yes.

Q And you deposited these extra monies right in the same bank where you had your corporate accounts, but only in your individual account at the same bank; is that right?

A Yes.

(continued next page.)

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Hornberger-direct

Q The time you deposited this money -- withdrawn.

The time you instructed the people, the girls in the office to make the checks payable to you, and the time that you deposited the checks into your own personal accounts, what did you intend to do with that money?

A Return it to the corporations.

Q When?

A As soon as the checks cleared, because I thought that I was setting myself up as a third party.

Q Any other time when you intended to send it back, besides when the checks cleared?

A Whenever Vicki would request money.

Q Whenever the corporations needed it?

A Sometimes one corporation -- extras would come in and they would clear and Vicki would request $10,000 for Story Book home, and it would be transferred to that account.

Q Did you return that money to the corporation?

A Oh, yes.

Q Did you return all of the extra payments that you had received in 1967 and 1968, which you deposited into your personal account, to the corporation's, in those yeam, in 1967 and 1968?

Hornberger-direct

A Yes.

MR. BENDER: Your Honor, how long are we going to go?

THE COURT: How long can you go?

MR.BENDER: Well, I hate to admit my weakness and my age.

THE COURT: All right, you may step down.

I am going to delay the continuance of the trial tomorrow until 10:15. I ask you to come in by 10:15. I have other matters on and I hope to be through with them by 10:15.

If I am delayed, you will understand.

I hope the evidentiary part of the trial will be completed by tomorrow. I am uncertain in my own mind as to whether the summations and charge will be given tomorrow. There is a strong possibility they won't be given until Monday.

So again, don't talk about the case, and when you reassemble, don't discuss it among yourselves.

The jury is excused. See you tomorrow.

(Jury leaves courtroom.)

THE COURT: Mr. Bender, if you do not get the requests to charge to me by 10 o'clock tomorrow, I just won't take them. I have to have an

opportunity to review them.

MR. BENDER: If we do not sum up until Monday, I would like your HOnor to give me until 4:30 tomorrow.

THE COURT: Mr. Bender, you are talking about time to give you? How about time to give me?

MR. BENDER: You are right.

THE COURT: If the request is an unusual one, I must check it through.

MR. BENDER: I am sorry. It is unfair to you.

THE COURT: You are saying 4:30 tomorrow. A little while ago you told me that I'd probably be able to charge tomorrow.

MR. BENDER: You are right, your HOnor.

By 10:15 tomorrow?

THE COURT: I intend to start 10:15.

I have a number of matters I am starting at 9:30. I will do my best.

* * * * * * * * *

I hereby certify that the [illegible] recorded on this pad are true and accurate notes of the proceedings contained therein.

Henry K. [illegible]

Official Court Reporter
U.S. District Court

THE COURT: Seat the Jury.

MR. BENDER: Good morning, your Honor.

I had these requests ready, but I was before Judge Weinstein.

THE COURT: All right, do you have the request?

MR. BENDER: Yes.

(Jury present.)

THE COURT: I understand Juror Three to say you have a problem?

JUROR NUMBER THREE: I would like your permission to be excused if this case goes to Monday. I start my vacation Monday. I have all my plans made.

THE COURT: What plans do you have?

JUROR NUMBER THREE: I am supposed to leave Sunday.

THE COURT: Do you have plane tickets and reservations?

JUROR NUMBER THREE: Yes, I do.

THE COURT: To where?

JUROR NUMBER THREE: New Orleans.

THE COURT: Well, I am going to ask you to stay. I may have to bring the Jury in Saturday. I cannot take a chance in continuing this case without an alternate. If there are only eleven left at the end of the trial, I must declare a mistrial and we must start

all over.

There are some observers of the Sabbath that cannot come in on Saturday?

JUROR NUMBER TWELVE: I will make an exception.

THE COURT: Wonderful.

We will see how it goes. That may be the alternative. I cannot risk not having twelve jurors when the case is finished. Everything that happened, just goes down the drain and we must start all over.

Mr. Hornberger, would you please resume and continue your direct examination.

MR. BENDER: With your Honor's permission, could I withdraw Mr. Hornberger for just one short character witness?

THE COURT: Any objection?

MR. RYAN: No.

J A M E S E. D O W L I N G , called as a witness, having been first duly sworn by the Clerk of the Court, took the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. BENDER:

Q Mr. Dowling, what is your occupation?

A I am Highway Superintendent of the Town of Smithtown.

Q Highway Superintendent in the Town of Smithtown?

Dowling-direct

A Yes.

Q And do you occupy any positions in the community?

A Yes, I am the President of St. James Little League, member of the Usher's Society of St. Philip's Church, past member of the Elks and past President of the Kiwanis Club of Smithtown.

Q When the jurors raise their hand, they do not hear you.

Would you please keep your voice up.

A OK.

Q Do you know Elmer Hornberger?

A Yes, I do.

Q How long do you know him?

A Approximately fourteen years.

Q And under what circumstances do you know him?

A I know him socially. I also know him as being the Highway Superintendent of the Town of Smithtown. Mr. Hornberger is a builder and we are involved in the planning and accepting of roads in the Town of Smithtown and all the work that he does that relates to Town work.

Q Do you socialize with him?

A Once in a while.

Q Visits your home?

A No.

Q Did you visit his home?

A Yes, once.

Q Does he attend the same church that you do?

A Yes, he does.

Q Have you ever had occasion to discuss with people in your department or in the community Mr. Hornberger's characteristics for honesty and integrity?

A I think quite often.

The fact I am involved in the Town, planning meetings and engineering meetings where Mr. Hornberger would be discussed and in many discussions about the types of buildings he is putting up —

MR. RYAN: Objection.

THE COURT: Strike it out. We are only interested in those traits of character that refer to him as a law-abiding citizen, his honesty and integrity.

Q Are you in a position to tell us what his reputation is in the community for honesty and integrity and for law-abiding qualities?

A Yes, I think as far as I know Mr. Hornberger is an upstanding citizen.

THE COURT: The community's point of view.

THE WITNESS: The community's opinion?

Q What is his reputation in the community?

A Fine -- very good.

MR. BENDER: No further questions.

THE COURT: Any questions?

MR. RYAN: None.

THE COURT: Thank you, you may step down.

Mr. Hornberger, would you resume.

E L M E R E. H O R N B E R G E R, called as a witness on his own behalf, having been previously duly sworn by the Clerk of the Court, resumed the stand and testified further as follows:

MR. BENDER: I will give Mr. Ryan copies as soon as we have a recess, your Honor.

THE CLERK: Defendant's Request to Charge, marked Court's Exhibit 2 for identification.

DIRECT EXAMINATION

BY MR. BENDER (continued):

Q Mr. Hornberger, I think we concluded yesterday by your telling us that your intention at the time that you instructed that the checks be made payable to you for extras, rather than the corporations, and at the time you deposited the checks into your personal accounts, that you intended to return the money to the corporations as soon as it was needed.

Do you recall that?

A Yes.

Q I asked you, did you do so?

A Yes.

Q And approximately how much did you return to the corporations in 1967 and '68 on the extras?

A One hundred and sixty-two thousand dollars -- one hundred and sixty-two thousand dollars.

MR. BENDER: We have stipulated here that the extras amounted to approximately forty-two thousand in 1967 and one hundred and thirteen thousand in 1968.

Q Is it your testimony that you returned that amount -- that total amount to the corporations representing the extra payments which you deposited to the corporations?

A Yes.

Q Did you know when you -- withdrawn.

Did you know that the extra payments that were given to you by the buyers was income to the corporations?

A Yes.

Q There isn't any doubt about it, is there?

A No.

Q What did you believe -- withdrawn.

Did you believe that that extra income was being

picked up by the selling corporation's returns?

A Yes.

Q What were the reasons for your believing that?

A I believed my accountant was picking up the income, because I was depositing the money back into the corporations.

Q Well, aside from depositing the monies back into the corporations, were there any records being maintained in your office with respect to the extras which were available to the accountant?

A Yes.

Q What kind of records?

A Miss Vicky Coletti was keeping records.

Q How about Miss Waugh?

A She was keeping records.

Q What kind of records are you talking about -- is this what you told us about yesterday, the letters that went out and the index cards?

A Yes.

Q And the job files?

A Yes.

Q Is that what you mean by the records?

A Yes.

Q Now, were those records available to Mr. Canale?

A Yes, they were available to everyone.

Q Did you know whether Mr. Canale did or did not examine those records which your girls had made up and kept in the job files?

A I didn't know whether he did or didn't.

Q Did you believe he was doing so?

A I believed so.

Q Now, did you lend any money to the corporations?

A Yes.

Q And in what form did you lend money to the corporations?

In other words, what form did the loans take, if you can recall? I am only talking about 1967 and 1968.

A Salaries, monies --

Q Well, what do you mean by "salaries?"

A My salary -- parts of my salary I would advance back to the corporations.

Q In 1967, according to your income tax return -- I think you're gross salary from all the corporations was something like thirty thousand dollars?

A Yes.

MR. BENDER: May we have the returns, please?

(Document handed to counsel.)

MR. BENDER: Thank you.

Q In 1967, according to Government's Exhibit 4, your wages and salaries are listed as thirty thousand six hundred dollars from the corporations; is that correct?

A Yes.

Q Now, your wife did not receive any salary from the corporations for the work she did in 1967, did she?

A That's correct.

Q Or in 1968?

A That's correct.

Q I think in 1967 -- withdrawn.

In 1968 -- withdrawn.

When you speak of salary being loaned to the corporations with respect to that thirty thousand dollars, what did you do?

A I advanced a portion of that money back to the corporations.

Q How did you do that -- who did you give it to-- did you have a check made out to you?

A Yes.

Q What was the procedure you followed?

A A check was disbursed to me and I cashed some and the balance would be deposited.

Q Who did you give the check to?

A Miss Coletti.

Q What would you tell her when you gave her the check?

A This was my salary -- this was my advance for me.

Q This is what you would tell her?

A Yes.

Q Why would you tell her that?

A Because I was lending my money to the corporation.

Q Why would you tell her this was an advance from you?

A Because that money was my money and I was entitled to it.

Q Were you telling her that because you wanted her to make a proper record as to the nature of the money?

A Yes.

Q Did you do the same thing with respect to your salary of eighty thousand dollars in 1968?

A Yes.

Q Did your salary in 1968 increase for any reason whatsoever that you know of?

A Yes.

Q What?

A I think it was eighty thousand dollars.

Hornberger-direct

Q Why did it increase, if you know, over 1967?

A Well, we had a growth program. I did more work and we did more business.

Q The tax returns of the corporations for 1968 would reflect the gross amount of sales that you did, would it not?

A Yes.

Q And what did you do with that salary or portion of the salary -- was a portion of that returned back to the corporations?

A Yes.

Q Did you follow the same procedure?

A Same procedure.

Q Gave it to Vicky Coletti and told her it was an advance?

A Yes.

Q What other forms did you make loans to the corporations, if you remember?

A There would be some money I would borrow from the banks and approximately twelve to fifteen thousand dollars that my mother lent me.

Q On those occasions, what procedure would you follow when you gave the money -- withdrawn.

Who did you give the money to on those occasions?

A Vicky Coletti.

Q The same girl?

A Same girl.

Q What instructions did you give her with respect to the money -- what the money was for?

A I told her that was advance money -- money that I had borrowed from the bank and it belonged to me.

Q Now, when the corporation needed monies, what other sources did you have besides the loans, your salary and the money from your mother?

A An escrow account -- excuse me, an extra account.

Q You mean the extras monies which you had received from the purchasers and which you deposited in your personal account?

A Yes.

(continued on next page)

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Q All right, what happened -- tell us how you happened -- what the mechanics were when you returned the extra money to the corporations.

Did you give it to Vicky Coletti the same way you gave her the loans?

A As she requested, I would return it to the corporations. To the corporation which it should be allocated to.

Q What did you tell her when you gave her the checks which were deposited into the corporate account -- did you tell her "These were loans, these were advances"? What did you tell her, if you can recall?

A I am sure I told her these were extras to the best of my knowledge.

Q To your best recollection?

A Yes, it is my best recollection.

Q You didn't tell her these were loans?

A They weren't loans.

Q They were not advances?

A They were not advances.

Q The form in which the other moneys took, which you gave her were such as salaries, some loans from third parties, the banks and your mother?

A That's right.

Q Do you know how she recorded those receipts from the extras at all?

A No.

Q Well, I am talking about -- except from what you heard here testified to, did you know in 1967 and 1968 how she was recording them?

A I assume she was recording them as extras.

Q Now, there has been placed into evidence here a series of schedules of the stockholders' advance account on the books of the various corporations marked H to L in evidence and they total $248,000 for 1967 and 1968.

Did you know, sir, that any of the extras which you had returned to the corporations -- wiwhich were deposted by Vicky -- were being entered or credited to your stockholders' advance account?

A No.

Q Did you ever instruct or advise anyone during 1967 and 1968 to enter those deposits as loans or advances from you?

A No.

Q Now, I show you H in evidence, which is page 1 -- refers to page 1 of Horn Enterprises for the year 1967.

On February 16, 1967 there is an entry here crediting your stockholders' advance with 5,000 and next to

it is the legend note -- N-O-T-E.

Do you see that?

A Yes.

Q Then there is an entry on March 7, 1967 of $4,000 listed "Transfer."

Then on April 27, 1967 there is an entry of $8,109.60 as "Salary."

Do you see that?

A Yes.

Q Can you tell us if you know what that note was for -- the $5,000 which is listed there?

A I assume it would be a loan from a bank -- I would imagine.

Q Well, did you on occasion ever give Miss Coletti notes to be deposited to the corporate accounts?

A Yes.

Q What kind of notes and where would you get them from?

A I would borrow it from my commercial bank where I have a line of credit.

Q A promissory note?

A No.

Q What kind of a note would you deposit -- if you do not know what that is, just say so. If you have any

idea what notes they are, tell us.

THE COURT: Did you ever give a note to the corporations that your commercial bank that you had a line of credit with discounted?

THE WITNESS: I may have.

THE COURT: All right, go ahead.

Q You think that possibly is such a transaction?

A It could be -- it's 1967 and --

Q Now, did you ever at any time discuss your stock -- withdrawn.

Did you in 1967 or 1968 ever examine these books and records of your corporations that are in evidence and in particular your stockholders' advance account?

A No.

Q Did you ever discuss with Mr. Canale or did he tell you of entries being made in the stockholder's advance account?

A No.

Q Did you ever know that you had as much as $248,000 credited to your stockholder's advance account?

A No no. It's quite a bit of money, no.

Q Now, when you returned the extra moneys to the corporations, you say you returned them whenever the corporations needed the money; is that right?

A Yes.

Q Was that the only source of money that was available to you in the event the corporations needed funds in 1967 and 1968?

A No.

Q Did you have any credit with any of the banks from which you had borrowed money in 1967 and 1968?

A Yes.

Q How much of a credit did you have which you could obtain just on your signature without any collateral?

A At least $50,000 at any time.

Q Which bank or banks was that?

A Eastern National, which is now Chemical.

Q Now, are you aware of the fact, sir, or were you aware -- withdrawn.

Were you aware of the fact in 1967 and 1968 that -- withdrawn.

Do you know what a balance sheet on a return is -- on a corporate income tax return?

A Not really.

Q Were you aware of the fact that there were balance sheets that were attached to the corporate tax returns which are in evidence here, which reflect loans from stockholders to the corporations?

A No.

Q When you signed these tax returns, did you read them?

A No.

Q Why not?

A Because I had implicit faith in my accountant.

Q Is that the only reason?

A I assumed they were correct. He is a CPA and a lawyer, plus the fact he keeps all the books.

Q Now, what about your personal income tax returns for 1967 and 1968.

Did you follow the same procedure that you indicated with regard to the corporate returns -- just signed them -- Mr. Canale gave them to you prepared?

A Yes.

Q Did you check them over at all?

A No, because sometimes they would be brought in almost two hours before the deadline.

Q Now, there came a time, did there not, when there was an audit examination and an investigation with respect to the corporate income tax returns and your own individual returns for 1967 and 1968. Do you recall that?

A Yes.

Q And were you interviewed on September 14th,

1972 by Special Agent Mazzella?

A Yes.

Q Was there any conversation between you with respect to extras?

A Yes.

Q Can you give us to the best of your recollection what Mr. Mazzella said or what he asked you and what you said to him? Was Mr. Canale present at the time?

A Yes.

Q And I think -- was there another agent with Mr. Mazzella at the time?

A Yes.

Q If you recall?

A Yes, there were four of us in the room.

Q Very good.

I am only limiting you at the moment just to extras.

A To the best of my recollection, Mr. Mazzella asked me to identify a group of transactions and I told him that these were extras that I had put back into the corporation from my own account.

Q What else did you tell him?

A I told him that my mother --

Q I am talking about the extras now. Let's

continue with theextras with respect to buyers making checks out to you. Was there any discussion on that?

A Yes.

I gave him my opinion, which I solicited from other people, that if I collected the extras in my name and deposited it in my account ad then in turn returned it to the corporations, the corporations would not be held liable for that transaction and only I would be held liable.

Q Do you recall whether you volunteered the information with respect to the extras or --

A I'm sure I volunteered it.

Q Were you asked any questions as to what your belief was with respect to whether the extras were being reported -- properly reported to the corporate income tax returns?

A Yes.

Q Well --

A I told them that I believed that they were all picked up as income on the corporations that they respectively belonged to.

Q And Mr. Hornberger, you have sufficient funds -- do you not -- in the corporations and your own to pay any tax --

THE COURT: Is there any objection to that

question.

MR. RYAN: Yes.

THE COURT: Objection sustained.

Q Now, you have been charged in Count 1 and Count 2 of this indictment with willfully, knowingly and intentionally cheating on your 1967 income tax return by willfully failing to report the proper income, and I ask you did you so willfully attempt to evade any taxes on your individual returns for 1967?

A No.

Q Is it your contention that as far as you know you did report the proper tax on your return for 1967?

A Yes.

Q And would your answer be the same as to 1968?

A Yes.

THE COURT: Do I understand the answer to be at the present or at the time of the filing, Mr. Bender?

MR. BENDER: At the time of the filing.

THE COURT: That is thequestion.

You had better rephrase it.

Q At the time that you filed these returns -- by you filing I mean signing and whoever filed them -- did you honestly believe that you were reporting the correct

and proper tax on your individual returns for 1967 and 1968?

A Yes.

Q And at the time that you filed -- withdrawn.

The time that you filed these corporate returns as the president, did you also believe that you were filing a proper and correct return with the proper income and the proper taxes?

A Yes.

Q Is there any doubt?

A None whatsoever.

MR. BENDER: I have no further questions.

(Continued on next page.)

Hornberger-cross

CROSS-EXAMINATION

BY MR. RYAN:

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Q Mr. Hornberger, are you a high school graduate?

A Yes.

MR. BENDER: I did not hear that.

THE COURT: Please, Mr. Shapiro.

(Answer read.)

Q Did you get any further education?

A Yes.

Q What education?

A Graduate from Adelphi College?

Q Did you major in any particular courses?

A Science and math.

Q I understand that you were discharged about 1956?

A Yes.

Q From the service, correct?

A Correct.

Q What did you do after you were discharged?

A I was discharged in '54.

Q All right, tell us what you did after you were discharged.

A Can I give you some background first?

Q Tell us what occupation you were engaged in

after you were discharged from the service?

A In '54 I was a student.

Q At Adelphi College?

A Yes.

Q Then you got your degree in math and science?

A I started out to be a doctor -- it was a combination of math and science.

Q You took some courses towards becoming a medical doctor?

A Yes.

Q Then you changed your courses there; is that it?

A I was 26 years old then.

Q You graduated from college with a science degree?

A Just a B.A.

Q Majored in math and science?

A It's hard to distinguish. I don't think the degree reads that way. It is just a B.A.

Q After you graduated, what did you do for a living?

A My first job was with Republic Aviation as, I guess you would call it in the form of a time study engineer and after that -- which I think was only about four months -- I went into business -- the building business.

Q You went right into the building business?

A Yes.

Q Did you have any experience in the trade?

A Yes.

Q What experience did you have in the trade before you went into the building business?

A Every summer and every vacation and every free moment that I ever had through my whole high school and college period, I worked in the construction trades, practically every facet.

Q Worked as a plumber?

A Plumber's helper.

Q Carpenter's helper?

A Yes.

Q Electrician's helper and things of that nature?

A Yes.

Q When you went into the building business, did you go in on your own as an individual?

A The first corporation that we formed in 1956 I had a partner.

Q What was your partner's name?

A I really -- it's so long ago. His first name was Paul. That's how we became Elpa. My name is Elmer and his name is Paul. We both went to college. I don't remember

his last name.

Q What was the name of the corporation?

A Elpa Builders, that was formulated in '56.

Q And did you build any homes in '56 under the Elpa corporation?

A Yes.

Q Can you give us some idea as to the extent you began building homes with your partner under Elpa corporation?

A The thing is, I was married in '56 and my partner was single, so really we bought some land together and naturally I had more responsibility than he did, so we dissolved the partnership before we ever built a house. He took some land, I took the other land and started building.

Q You started building?

A Spot lots -- individual lots -- wherever I could buy a small lot here and there.

Q At the time you did that, were you in partnership?

A Not when I was building, no.

Q You were on your own -- your own corporation?

A When I was building, yes.

Q What was the name of that corporation?

A Elpa Builders.

Q Did you buy your other partner out of the

corporation?

A We exchanged and bought each other out with land.

We just divided whatever assets we had -- we divided equally.

Q You were now sole stockholder of Elpa Building Corporation, correct?

A Yes.

Q Your corporation.

You began building houses on individual lots as opposed to developments, I take it?

A Yes, I would go out and try and buy the lot as reasonably as possible, build on it, supervise it, do a lot of the work myself, tarring the foundation, sell the house, going to the bank and financing it.

(continued on next page)

Q Did Mr. Canale represent you then?

A Not in 1956.

Q Well, did you have an accountant then?

A Yes.

Q What was his name?

A Carl -- I don't remember his name. He is the head accountant for Grumman Aviation now. But I don't remember his last name, just Carl.

Q You started building as a sole stockholder of the corporation in 1956? Is that right?

A Yes.

Q And how about the year 1957, were you still building as a one-man corporation?

A Yes.

Q And what accountant represented you then?

A Accountant?

Q Yes.

A I think Carl still represented me in 1958. I am not sure because --

Q I am talking about 1957.

A Oh, I am sorry. In 1957?

Q Right.

A I am sure Carl did.

Q In the year 1958 were you operating as a one-

man corporation?

A Yes.

Q What accountant represented you in that year?

A I think at the end of '58 or in '59 Carl introduced Mr. Canale, and then he became my accountant. Now, I'm not sure if it was the end of 1958 or beginning of 1959.

Q Well, how did it come about that you were introduced to Mr. Canale?

A Well, Carl got promoted to Controller and he just couldn't do any more side work. And he introduced me to his friend, Thomas Canale, and highly recommended him as a CPA and a lawyer.

Q Did he tell you that Mr. Canale represented other builders?

A I don't think I asked him that question.

Q Did you ask Mr. Canale whether he is familiar with the industry?

A Yes.

Q And what did he tell you?

A That he was a CPA.

Q What did he tell you when you asked him whether he is familiar with the building business?

A Yes -- well, he was familiar with the building

business.

Q I am sorry?

A That he was familiar with the building business.

Q Mr. Canale told you that?

A To the best of my recollection.

Q Now, we are talking about the year 1958; correct? Do you understand that?

A 1958.

Q And at that time, Mr. Hornberger, you were operating in that year as a one-man corporation? Correct?

A That is right, Mr. Ryan.

Q And Mr. Canale was doing accounting work for you?

A Again, I am not sure, in 1958 or 1959, if Mr. Canale started.

Q Let's take the year 1959. Were you conducting your business as a one-man corporation?

A One-man corporation?

Q Yes, surely.

A Or do you mean other corporations?

Q No. Elpa Builders was the first corporation you told us you operated under to build homes.

A Yes.

Q By the year 1959 had you formed any other

corporations?

A I don't know if Dotal was formed in 1959 or not. That would be like Dot and Al. My wife's name is Dot. My nickname is Al.

Q And did Mr. Canale have anything to do with the formation of that corporation?

A I think he did, but I am not sure.

Q How did it come about that you formed another corporation, the Dotal Corporation?

A Well, in the building business you are building in different areas. So consequently in those days we were building say from Hempstead to Massepeque and over across to Farmingdale, and over to New Hyde Park. So we would try to segregate one corporation to one area and another one to another area to simplify job numbers and not cross each other.

Q When you say, "We," who are you referring to?

A Well, I always use the word "we," because "I," seems like you are egotistical, but it was me.

Q You were the sole stockholder-owner of the corporation?

A Yes.

Q What area did the Dotal Corporation cover for its business on Long Island?

A I -- you have me at a complete disadvantage because I don't know when Dotal was formed.

Q Well, it is on the tax return.

A If you can refresh my memory then I could tell you where it was building.

Q I show you Exhibit 11 (handing).

A This is Horn Enterprises.

Q I am sorry. I show you Exhibit 9.

A This is Dotal Builders.

Q Is that the corporation you are referring to?

A Yes.

Q When was it formed?

If -- is this the form that you would use to form a corporation?

THE COURT: If you don't understand the question say you don't understand it.

THE WITNESS: I don't understand it, no.

THE COURT: Are you referring to something in evidence?

MR. RYAN: Yes, I am.

THE COURT: I will allow you to read anything in evidence that you believe is a predicate to any question you want to ask. Just read it to the jury and then ask the question.

Q According to Exhibit 9 the Dotal Corporation was formed September 1962. Does that refresh your recollection?

A If that is when it was formed, it was formed in 1962.

Q That is the second corporation you formed as you became a builder in the business, is that correct?

A Yes.

Q Now, in 1962 -- in 1959 Mr. Canale was your accountant?

A Yes.

Q 1960, 1961; correct?

A Yes.

Q And in 1962 he was your accountant when you formed the Dotal Corporation? Right?

A Do you have the incorporation records?

THE COURT: Do not ask any questions, Mr. Hornberger. If you don't understand the question, say you don't understand the question.

A (Continuing) I don't know whether he formed the corporation or not. Mr. Wolfsont could. He was my attorney.

THE COURT: No. You are asked the question. If you don't know the answer, please say, "I don't

know.

THE WITNESS: I don't. To the best of my recollection, I don't know.

Q Now, there came a time when you formed other corporations? Correct?

A Yes.

Q Horn Enterprises?

A Yes.

Q And Story Book Homes?

A Yes.

Q And the Story Book Manor Corporation?

A Story Book Homes was not formed by me.

Q Who formed it?

A Richard Kudek.

Q When? Approximately.

A I'm not sure of the year.

Q Well, according to --

A Or it might be Peter Kudek, his father.

Q According to Exhibit 13, the tax return for Story Book Homes, it says that it was incorporated in February 1960.

A By whom?

THE COURT: Strike it out.

(Continued on next page.)

Hornberger-cross

Q Well, were you doing business with a partner, Mr. Kudek, for any period of time?

A Yes.

Q And can you tell us what year you began doing business with Mr. Kudek?

A It is difficult because I was doing business individually by myself, and also doing business with a college friend of mine, Mr. Kudek, under Story Book Homes.

Q And did there come a time -- well, when you were doing business with Mr. Kudek, what did that mean? Were you both stockholders in one of those corporations?

A Just in Story Book Homes.

Q And did there come a time when Mr. Kudek no longer was a stockholder with you in the Story Book Homes?

A Yes.

Q When was that?

A To the best of my recollection, I think it was 1964 because I had to pay a lot of money, and it was paid off by 1966, or it might be 1966 -- 1964 or '66.

Q You had to pay Mr. Kudek?

A For his stock.

Q For his interest in the business? Correct?

A Yes.

Q All right. Now by 1966 you were operating all

these corporations as the sole stockholder? Is that your best recollection?

A To the best of my knowledge.

Q Well, is there any question that there came a time prior to 1967 when you operated all these corporations as its sole stockholder?

THE WITNESS: Would you repeat the question, please.

THE COURT: Mr. Simon?

(Record read.)

A I think Mr. Kudek and I were still partners prior -- we were partners prior to 1967 or something in Story Book Homes or one of the corporations.

Q Are you able to tell us when you became the sole stockholder of Story Book Homes? The year?

A It's either -- it's either -- it's confusing-- it's either 1966 or 1964.

THE COURT: But the only corporation that anyone else had any stock in of the corporations mentioned was Story Book Homes, Inc.? Right?

THE WITNESS: Yes, your Honor.

THE COURT: And all the others that were mentioned here, you were the sole stockholder?

THE WITNESS: Yes, your Honor.

Hornberger-cross

Q And you were the one who hired Mr. Canale, the accountant?

A Yes.

Q Now, with respect to extras, when you were Mr. Kudek's partner in Story Book Homes, how were those monies paid?

MR. BENDER: I object to it.

THE COURT: May I have the question, Mr. Simon?

(Record read.)

THE COURT: Overruled. I will allow it.

A To the best of my recollection, to the corporation.

Q Now, you told us yesterday that you changed this procedure, early '67, correct?

A Somewheres in the early months of '67. I don't know exactly what month.

Q And you told us that in the year 1966 you had some difficulty concerning payments for extras? Correct?

A Yes.

Q What was the difficulty?

A Well, sometimes, being I was a one-man operation, we would get to the closing and the extras wouldn't be paid. The people would want to negotiate, try to reduce the price of the extras down because they felt it wasn't to their

satisfaction.

Q When they did that at the closings for 1966, what did you do?

A Being a businessman, I negotiated.

Q And what was the result of your negotiations?

A Sometimes I took less than what they contracted for on the extras.

Q On how many occasions did that occur in 1966? Approximately.

A Enough to where it became a very aggravating and irritating point and where the bank would only allocate us one hour and not the time to haggle over whether work was completed or not completed.

Q On approximately how many occasions in number did that occur in 1966?

A I couldn't give you an exact amount.

Q Can you give us an approximate figure?

A I wouldn't want to lie, Mr. Ryan.

THE COURT: No, just estimate it.

THE WITNESS: Enough to where it was becoming aggravating --

THE COURT: Mr. Ryan wants to know whether you can estimate it? Was it once, five times, ten times?

THE WITNESS: It was a numerous amount of times.

THE COURT: Can't you estimate a number?

THE WITNESS: Your Honor, there was a lot of closings and I really do not want to tell a lie if I don't know.

THE COURT: If you can't estimate it, either in numbers or percentage, then say you can't estimate it.

THE WITNESS: I can't estimate it.

THE COURT: That's it.

All right, go ahead, Mr. Ryan.

BY MR. RYAN:

Q On these occasions where you felt you were forced to negotiate the amount paid for extras, how were the checks made out?

A To the corporation.

Q And what would you do with those checks?

A They would be deposited.

Q Where?

A In the respective corporation that conducted the closing.

Q And who would you hand them to?

A In 1966? The accounts payable girl would have been either Sophie Pace or possibly Charlotte.

Q What would you tell her at that time when you gave her the checks?

A Those are the proceeds from --

Q From the sale?

A -- (continuing) -- the sale. Well, there would be a closing statement that accompanied it.

Q And you knew at that time, did you not, that those were the records that Mr. Canale would pick up to do his accounting?

A No.

Q Did you ever see Mr. Canale come over to your office to take the records to do his work?

A Well, he came to my office, yes.

Q Did you ever see Mr. Canale ever take any records from your office for doing his work?

A Yes.

Q Did you ever see what records he took? Can you tell us what they were?

A I think he took ledgers, checkbooks.

Q Ledger books like the ones that are in evidence, those physical type books (indicating)?

A No, not those. He kept those all the time. But then I think he brought them back sometimes. Really it is hard to explain. But I was a one-man operation running a multi-million dollar business, and that I didn't get myself involved in the bookkeeping.

Hornberger-cross

Q Did you ever have any conversation with Mr. Canale from 1959 or 1966 as to how we should set up the bookkeeping system in your office?

A No.

Q Did you ever ask him, "What's the best way to record the proceeds from these sales"?

A No.

Q Did you ever ask him, "What is the best record-keeping practice that I can maintain to accurately record how much money these corporations of mine are earning"?

A No, he was a CPA.

Q Did you ever ask Mr. Canale --

THE WITNESS: May I have a drink of water?

MR. RYAN: Mr. Clerk, the witness would like a drink of water.

THE WITNESS: You speak loud so you get dry.

(Deputy Clerk complies.)

THE WITNESS: Thank you.

BY MR. RYAN:

Q Did you ever ask Mr. Canale's advice as an accountant and attorney from 1959 to 1966 as to what is the best way to record the income that my corporations are earning?

A No.

Q Now, as I understand it -- withdrawn.

Q When you had this difficulty in 1966 with buyers over extras, did you talk to anyone about it?

A I think so.

Q Who did you talk to?

A I think I talked to my lawyer.

Q Who is that?

A Mr. Wolfsont.

Q And what did you tell Mr. Wolfsont?

A Well, I asked him his opinion as to how I could set up a third party transaction to stop these aggravating episodes at the closings, because he was at the closings also.

Q Did you suggest to Mr. Wolfsont any method by which you could stop these aggravating instances?

A I do not think so.

Q Did you talk to anyone else about this problem?

A I may have. You know I associate with a lot of accountants and lawyers.

Q Did you ever talk about it with Mr. Canale?

A No, not with Mr. Canale.

Q In all the years from 1959 to 1966 did you ever ask Mr. Canale, your accountant and attorney, his advice on corporate matters?

A In reference to what?

Q Extras?

A No.

Q The method of accurately recording income?

A No.

Q After talking to Mr. Wolfsont, you changed your procedure, I take it, for the payment of extras?

A I can't pin down that he was responsible for it. In my own mind I thought I was doing the right thing.

Q Well, can you tell us whether you relied on anybody's advice to change your procedure?

A May I use a cliche?

Q No. I prefer that you just answer the question to the best of your ability without cliches.

A Well, to the best of my ability, I think I tried to pick the brains of a lot of people and I came to this conclusion.

Q Well, when you picked the brains of a lot of people, did anybody tell you hold up the closing; don't sell the house until you get paid for the extras?

A I don't know.

Q Is it possible that someone told you that?

A I don't know.

Q After talking to these people about your problem, you changed your procedure to the extent that you requested buyers to make checks out to you personally? Right?

A May I say something besides a yes or no?

(continued on next page)

THE COURT: Do you want a yes or no answer?

MR. RYAN: I would first like a yes or no.

THE COURT: Yes or no --

THE WITNESS: With an explanation.

THE COURT: No, if you can't answer it yes or no, say you can't answer it.

THE WITNESS: Repeat the question, please.

(Record read.)

A Yes, but it was on my own decision, not from any specific person.

Q And can you tell us what your thinkingwas when you made that decision?

A I thought that if I collected the money directly to myself and deposited it in my account and returned it to the corporations that I was doing the correct thing.

Q Can you tell us what your basis was for thinking that that was the correct thing to solve your problem?

A Because now if there was difficulty in any aspect of a house, either Horn Enterprises, Elpa Builders, Dotal, Story Book Manor, or Story Book Homes, they would move against me individually and not attach my corporations or bring a suit against my corporations which would affect

my credit.

Q Your credit?

A My credit in the building business. You know you don't like to get sued.

Q Did you have credit with any other bank besides the one that Mr. Mahon talked about?

A I think I had credit with the Tinker National at Setauket.

Q So by having the buyers make the checks out to you personally you could sue them in your own individual capacity; is that it?

MR. BENDER: I object.

THE COURT: Objection sustained.

A Do you mean if they didn't pay the check --

THE COURT: I sustain the objection, Mr. Hornberger.

THE WITNESS: Oh, I am sorry. I don't understand the law.

THE COURT: Well, when I sustain an objection it means don't answer it.

THE WITNESS: I am sorry, your Honor.

Q Were you ever sued by any buyer as a result of extras?

A Not to my knowledge.

Q Did you ever sue any buyer as a result of extras?

A I think I am one of the few builders that have sued people, yes.

Q How many in 1966?

A I don't remember, really.

Q Can you estimate the number?

A I can't estimate a number.

Q For the year 1967 did you sue anybody for extras?

A I don't think so.

Q For the year 1968 did you sue anybody for extras?

A This is specifically for extras?

Q Yes.

A I don't think so.

Q Now, did anyone tell you when you were seeking advice about this problem to have the checks made out to you personally?

A I don't understand the question.

Q Did anyone tell you that you should have the buyers make the checks payable to Hornberger to solve the problem you experienced in 1966?

A No, I think I made that conclusion myself

from the consensus of what I had heard.

Q And at the time that you came to that decision you also decided that that check should be deposited to your personal account? Is that right?

A Yes.

Q Did you ever consider simply endorsing the check and depositing it into the corporate accounts?

A No, because I would want to collect it. That is the problem. Because if I just endorsed it over immediately they could have stopped the payment on it.

Q Could they have stopped payment on it if th just made it out to you individually and you deposited it into your personal account?

A Yes, but it wouldn't affect my corporation.

THE COURT: Will you please try to just answer the question.

THE WITNESS: I am sorry.

THE COURT: Strike out, "but it wouldn't affect my corporation." The jury is to disregard it.

Q Now, did you ask Mr. Canale prior to making this decision as to what effect this would have on the corporations?

A No.

Q Did you see his advice on the matter?

A No.

Q Now, you began depositing these checks on payments for extras into your personal account?

A Yes.

Q At the beginning of 1967? Correct? We have been talking about three personal accounts that you had in this case, do you recall that, in which the extras were deposited?

A Yes.

Q One account was in the same bank that held your corporate accounts, isn't that right?

A That's wrong.

Q What bank did you have these three accounts in?

A The bank of Smithtown, the Tinker National in Setauket and Eastern National of Smithtown, which is now Chemical.

Q Now, the Bank of Smithtown account was in existence at the time you made this decision to handle the monies on extras, was it?

A Yes.

Q That was your personal account?

A Yes.

Q And what did you use that account for prior

to 1967?

A Household expenses, country club expenses, pharmacy, my children's expenses.

Q You wrote checks right out of your personal corporate -- I am sorry -- you wrote checks out of your Bank of Smithtown account for your personal expenses prior to 1967, right?

A Yes.

Q And during the year 1967 did you use the Bank of Smithtown again for your personal expenses to any extent?

A I may have because there was money in there from 1966.

(Continued on next page.)

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Q Well, did you deposit any monies received other than extras into that account?

A I believe I did deposit some money that my mother lent me or money that I would have borrowed or some sort of other funds possibly.

Q Not arising out of any corporate transactions though; is that it?

A No.

Q Arising out of your personal affairs?

A Well, you say "affairs" what do you mean by "affairs?"

Q Would you --

A That would be making profit on something and not reporting it.

Q You borrowed money from your mother in 1966?

A '66, no.

Q That came later?

A That came during the period of '67 and '68.

Q And did she write a check out to you?

A No, it was in the form of cash.

Q Where did your mother keep the cash?

A In her home.

Q Where in her home?

A Must I reveal that?

THE COURT: Yes, I direct that you answer.

THE WITNESS: In the basement.

Q Where in the basement?

A In the crawl space.

Q Where in the crawl space?

A Very close to the plumbing.

Q Was it in an envelope?

A It was in a little box there (indicating).

Q What kind of a box?

A A $3.98 special that you get in a stationery store.

Q Tin, metal?

A I think it was a cheap grade of tin.

Q That was during '67 and '68 that you borrowed, correct?

A Yes.

Q The same time, did you borrow money from the Eastern National Bank -- Mr. Mahon's bank?

A Yes.

Q Between ten up to fifty thousand dollars?

A Yes.

Q Where did you deposit the money that you borrowed from the Eastern National Bank?

A Under what form would I be borrowing it?

Q Can you tell us --

A Can you give me a question under what form I would be borrowing it?

THE COURT: Strike out the answer as not responsive.

THE WITNESS: I cannot answer the question.

THE COURT: Then say you cannot answer the question.

THE WITNESS: Right.

Q Now, according to the records in this case you opened a second personal account during the year 1967.

The signature cards indicate that you opened the account in your name on June 14, 1967.

Now, can you tell us how it came about that you opened up a second personal account in 1967?

A In what bank?

Q Tinker National Bank.

A Well, during that period we had some of our corporate accounts in the Tinker National Bank because that was very close to a job where we were building and it was convenient to use the Setauket Office instead of going all the way to Smithtown, which was about 10 miles away.

Q How many offices did you in 1967 have for the conduct of your business?

A I didn't hear you, Mr. Ryan?

Q How many offices did you have in 1967 for the conduct of your business?

A Corporate offices?

Q Yes, any kind of offices.

A I still don't understand it.

THE COURT: The witness does not understand it.

THE WITNESS: You mean offices where you work?

THE COURT: If you do not understand, just say you don't understand.

THE WITNESS: I don't understand it.

Q Now, this Tinker National Bank account in your own name, did you deposit solely extra payments in to that account?

A There would be extras.

Q Anything else?

A There would be some money from my mother, some money that I borrowed and could possibly be some money from my salaries.

Q Well, when you borrowed -- when you referred to borrowings, do you mean for yourself or for the corporations?

A Individually for myself, because that's --

Q All right, did you write checks out of that account, other than those that we have been referring to as

advances to the corporations?

A Yes.

Q And for what purpose would you write other checks out of that Tinker Bank account?

A Again for maybe a pharmacy bill, a suit, personal things, my wife may need, household expenses, maybe the oil bill, telephone bill.

Q Do you have any idea to the extent that you would use that account for these personal expenses?

A Not really.

Q Would be an isolated instance that you would use the account for personal expenses?

A Whatever personal, you know, small personal expenses.

I would also use it for contributions also.

Q Now, you opened a third account in your name during 1967 according to the documents in evidence at the Eastern National Bank on May 8, 1967?

A Yes, if that's the correct date.

Q That is what is shown on the signature card attached to the exhibit.

A I don't dispute it, yes.

Q All right.

Can you tell us how it came about that you

opened a third personal account in 1967?

A Well, the offices at Eastern National Bank offered me a larger line of credit than I could have at Tinker and therefore swayed me over to that bank.

Q Well, did you still maintain that account and use it at the Tinker National Bank, after you were swayed over to Eastern?

A Until it was phased out, yes, because I still kept some corporate accounts there.

Q You deposited -- according to the documents in evidence -- extra payments into this Eastern National Bank account.

Did you deposit any other monies into that account?

A Yes, I am sure I deposited some loans, some money from my mother, some money that I would borrow -- possibly parts of my salary.

Q And did you use that account for personal purposes?

A Yes.

Q Can you give me some idea of personal purposes you used it for?

A Again, whatever household expenses that were needed, pharmacy, maybe a gas bill, oil bill, telephone bill.

Q Do you have the cancelled checks for those accounts for those years, 1967, 1968?

A No.

Q The bank statements?

A No.

Q The deposit slips?

A No.

Q Did something happen to them?

A Yes.

Q What was it?

A They were lost in a flood.

Q I take it that there came a time when you gave instructions to have letters written to buyers concerning making payments to you personally, correct?

A Yes.

Q And to whom did you give those instructions in the first instance?

A Miss Charlotte Waugh.

Q Did you tell Mrs. Waugh the reason for those instructions?

A I am sure I did, but I can't really remember.

Q You are positive that you said something to her concerning the reason for this change, correct?

A Well, she was aware that we were getting bum

checks.

Q Are you positive, sir, that you told Charlotte Waugh the reason for having these letters prepared?

A To the best of my recollection I had a conversation with her and I think I told her.

Q What do you think you told her?

A That we would collect now in my name -- in the early part of '67 -- instead of the corporation's name and it would eliminate the problems we were having.

Q What did you tell her about the problems that you were having?

A Well, some times you don't discuss so many things with a secretary.

Q I only want to know what you did discuss with her.

Did you tell Mrs. Waugh anything to the effect that you wanted these letters changed for payments to be made to you personally?

A I instructed her to make them payable to me personally.

Q Did you give her the reason for these instructions?

A I believe I did, to the best of my recollection.

Q What do you believe you told Charlotte Waugh

was the reason?

A I don't know if I went into it in full detail. I just said "change the procedure."

Q So you didn't tell her the reason?

A I don't know, Mr. Ryan -- that's '67 -- or not.

Q Did Charlotte Waugh open the mail when it arrived in the office?

A I believe so.

Q To what extent did she open the mail in the morning when it arrived in the office?

A Well, it would be necessary because she would have --

Q Excuse me, can you tell me to what extent Charlotte Waugh would open the mail received by your office in the morning.

THE COURT: By extent, do you mean if she opened all the mail or only some?

MR. RYAN: Correct.

A She had carte blanche authority to open all the mail.

THE COURT: Did she?

THE WITNESS: To the best of my knowledge she did.

Q You didn't --

A Open all the mail?

Q Yes.

A I was a pretty busy man. I don't think I opened all the mail.

Q You only opened some of it?

A I don't know if I opened some of the mail. She generally allocated it onto my desk. She brought it in to me. That is generally what a Girl Friday does.

Q Who opened the letters containing -- withdrawn.

Who opened the envelopes containing the checks for extra payments in your office?

A Anybody that picked -- that the mail was in front of them.

Q Did you do that?

A I may have at times.

Q Sometimes?

A If the mail was put on my desk and it wasn't opened, I would have to open it.

Q Did you give anyone in the office instructions as to opening the mail in the morning?

A Yes.

Q Who did you give them to?

A To Charlotte.

Q What did you tell her?

A To distribute the mail.

Q What did you tell her concerning opening the checks?

A Open any letter -- I wouldn't know if there was a check in there. How would I know if there is a check in the letter?

Q Did you ever see the extra checks that buyers sent after it arrived at the office?

A Yes.

Q When and under what circumstances would you see them?

A The girls would bring them to me.

Q In other words, the girls would see the checks first and hand them to you?

A Yes.

THE COURT: They would take them out of the envelopes and hand them to you, are you saying?

THE WITNESS: Yes.

Q You didn't open the envelopes as a matter of normal practice and take the checks and keep them to yourself?

A No.

Q Charlotte Waugh or some other girl would do that and hand them to you?

A Yes.

Q What would you do with the checks?

A I would look at the checks and see if it corresponded to the right amount.

Q According to what?

A The right amount of the extras. There were three forms kept in the office. Charlotte one, a general file was kept, and I had a file. I would double-check -- to use a hypothetical -- if it was $1200 and Joe Smith sent the $1200 and that's the letter that Charlotte sent out for the request for the $1200 -- if it was $1200 I looked at it, give it to her, and she would record the payment as received. Then I would take the check or possibly I would walk in with the check and tell her that it's paid -- I have it in my hand -- and then I would make out a deposit slip.

Q Would Charlotte Waugh give you the relative correspondence concerning the check that she had in her hand for your comparison?

A No, I had one, she had one and the general office had one.

Q Charlotte Waugh would hand you the check and you would refer to some record to see if payment was in full, correct?

A The same record she had.

Q When you satisfied yourself that the payment

was correct --

A Yes.

Q -- what would you do with the check?

A I would endorse it on the back.

Q To whom?

A For deposit, Elmer E. Hornberger, and make out a slip.

Q What would you do with the check and the deposit slip?

A Sometimes I would deposit it myself and sometimes I would give it to the girls in the office and let them deposit it with the other deposits, because it's going into the same bank.

Q Did you give Charlotte Waugh these checks in any substantial amount for deposit into your personal accounts?

A You mean would she go down to the bank and deposit it?

Q Yes.

A If she was going that way with deposits from the corporations, it was the same bank and she would make a deposit -- why not.

Q Would that happen on a few occasions or on many occasions?

A She could do it, Vicky could do it, my salesmen could do it, anyone going to the Smithtown.

Q When would you do it?

A Whenever passing that way, I would do it.

Q Only on a few occasions?

A I couldn't number the occasions.

Q No percentage -- can you tell us whether a few, a lot or all when you deposited the checks?

A I think they would deposit a greater percentage than I would.

(Continued next page.)

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CROSS-EXAMINATION

BY MR. RYAN: (Cont.)

Q The girls would handle these payments for extras and deposit them?

A If they were going to the bank -- whoever was going to the bank -- I mean, that's how we worked our office.

THE COURT: Mr. Hornberger, Story Book Manor, Inc., Dotal Building Corporation and Horn Enterprises Inc. were organized for building one-family houses; is that right?

THE WITNESS: Yes, your Honor.

THE COURT: Was there ever a time that either of these corporations bought land and resold the land without improving it?

THE IWTNESS: I believe so.

THE COURT: In that sale, did it ever suffer a loss -- any of the corporations?

THE WITNESS: I don't think so, your Honor.

THE COURT: Did any of these corporations ever invest in stocks or bonds of another corporation?

THE WITNESS: NO, your Honor.

THE COURT: Their only business was activity was buying the land, building homes or occasionally reselling the land?

THE WITNESS: Yes, your Honor.

THE COURT: Do you know whether any of these corproations during any tax year, from the time they were organized to the end of the tax year, '68, suffered any loss?

MR. BENDER: I have to object to that, most respectfully.

THE COURT: Overruled.

THE WITNESS: I am not sure, your Honor, because my accountant handled these matters.

THE COURT: Do you know of any loss that these corporations suffered from the time organized until the end of '68?

THE WITNESS: I would have to say honestly, I don't know.

THE COURT: We will suspend a few minutes to give the defendant an opportunity to put some character witnesses on.

MR. BENDER: Could Mr. Wolfsont handle the character testimony?

THE COURT: I am not excusing the jury.

(continued next page.)

WERNER UHLAND, called as a witness herein, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WOLFSONT:

THE CLERK: State your full name, please.

The WITNESS: Werner Uhland.

Q Mr.UHland, what is your occupation?

A I am the New York Regional Sales Manager for Triangle Pacific.

Q What kind of business is that?

A We are in the forest products business.

Q Are you in the lumber business generally?

A Yes, we are in lumber. kitchen cabinets and like p olucts.

Q What is the general nature of your work?

A My personal work?

Q Yes, please.

It's my job to see that we market and sell our products to builders and -- to get to see engineers, architects and market everything that we have.

Q Do you personally get around to see the builders?

A I do. With my sales force.

Q Do you have any business with Mr. Hornberger or any of his corporations?

A Yes, we do.

Q Do you know Mr. Hornberger socially?

A I do.

Q Have you attended any social occasions with him that you can remember?

A Yes. Mr. Hornberger is quite active in charities of which I am also and we have attended dinners and dances for Cooley's Anemia --

Q Do you have mutual friends and acquaintances?

A We have mutual friends -- most of them are both business and social.

Q Did there ever come an occasion when you discussed Mr. Hornberger?

A Frequently.

Q Do you know whether during these discussions you had -- and do you know whether or hno from these discussions you have an opinion with respect to his honesty and integrity amoung these business acquaintances?

A His integrity and honesty was never questioned.

Q What would you say that opinion was?

A Excellent.

Q That is the opinion that he enjoyed in the community?

A Yes.

MR. WOLFSONT: Thank you.

MR. RYAN: No questions.

THE COURT: Your next witness, please.

(Witness excused.)

(continued next page.)

RONALD KLEINFIELD, called as a witness herein, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WOLFSONT:

THE CLERK: State your full name, please.

THE WITNESS: Ronald Kleinfield.

Q Mr. Kleinfield, what is your occupation?

A Sales and contract manager of Wachberg Roofing in Lynbrook, Long Island.

Q Do they conduct business in the Suffolk County area?

A Yes.

Q Do you have occasion to do business with Mr. Hornberger or his corporation?

A I have for many years.

Q About how many years would that be?

A I would say about 12 years.

Q Do you have any mutual friends and acquaintances?

A I think so, yes.

Q Have you ever visited his home?

A Yes.

Q Have you attended any social function with him?

A We have.

Q Do you know his reputation for honestly and integrity amoung your friends and acquaintances?

A He has a fine reputation.

MR. WOLFSONT: Thank you.

MR. RYAN: No questions.

THE COURT: You may step down.

(Witness excused.)

(continued next page.)

E L M E R E. H O R N B E R G E R ,

having been previously duly sworn by the Clerk of the Clerk, resumed the stand and testified further as follows:

CROSS-EXAMINATION

BY MR. RYAN: (Cont.

Q After you deposited the extra payment checks into your personal accounts, I take it that there came times when you wrote checks to your corporate accounts --

MR. BENDER: Excuse me.

A I don't understand.

MR. BENDER: The checks on the corporate account -- I withdraw my objection.

Q In response to Mr. Bender's question you told us that you advanced about $126,000 during the two years in question -- from your personal accounts into your corporate accounts.

A I transferred the extras which belonged to the corporations, back to the corporations.

Q Now, you did that did you not, by simply writing a check out in a certain amount?

A Yes.

Q What would you do with the check after you wrote it out?

A I would give it to my accounts payable girl, Vickie Coletti.

Q And what did you tell Vickie Coletti when you gave her that check?

A The first time?

Q Yes.

A To the best of my recollection that this is -- thi money represents extras -- which is going back to the corporations.

Q That's what you told Vickie Coletti?

A To the best of my recollectioN.

Q Did you tell her to make any record that monies represeted extras?

A No.

Q Did you tell her to make any record at all concerning the identification of this money?

A No.

Q After you gave -- withdrawn.

What would physically happen with the check in this procedure?

A When Miss Colletti had the --

Q Would you hand the check to her?

A I would hand it to Mrs. Coletti because it's a personal check. She would take a corporative --

Q Deposit slip?

A -- and make it out.

Q She would write something on the deposit slip?

A Whatever amount is on the check.

Q And would you tell her hwat to write on the deposit slip?

A No.

Q What would happen with the check and the deposit slip next?

Whoever was going to the bank would deposit it.

Q Did you go to the bank to make deposits?

A Sometimes.

THE COURT: I think we have gone over this, Mr. Ryan. Let's not have repetitious questions.

All right.

Q When you went to the bank to make the deposits into the corporate accounts, would you make any notations on any deposit slips?

A No.

Q You were asked on direct examination about a $5000 note.

A Yes.

Q That was deposited into a corporate account, do you recall that?

A Yes.

Q In what form was this note to the best of your recollection?

A To be honest with you, Mr. Ryan, I -don't remember what that note is.

Q Well, was it a check?

A I don't know -- I think that was '67 that you showed me.

Q Now, with respect to what your gal Friday Vickie Coletti would do with this money --

A Vickie Coletti was not a girl Friday.

Q What was she?

A An accounts payble girl.

Q Okay.

Did you give her any instructions about recording monies into those accounts?

A Into what accounts?

Q The corporate accounts.

A No.

Q None whatsoever?

A No.

Q Where -- I take it she had a checkbook at her

desk, correct?

A I believe so.

Q Where is that checkbook?

A Now?

Q Yes.

A We don't have it -- it's not in existance.

Q What happened to it?

A It got lost in the flood.

Q When Mr. Canale came to your office did you see him pick up those check book stubs?

MR. BENDER: What year are we talking about, Mr. Ryan?

MR. RYAN: '66.

THE WITNESS: '66?

MR. RYAN: Correct.

A Mr. Ryan, that's eight years ago, I don't know.

THE COURT: What is your answer?

THE WITNESS: I can't remember.

Q '67?

A To the best of my knowledge -- I imagine he would, but I don't remember.

Q '68?

A I'd have to give the same answer.

Q Now, during 1967 and 1968 -- would you write any checks out of your coporate bank accounts?

A Myself?

Q Sure.

A Would I write myself?

Q Who signed the checks out of the corporate bank accounts?

A I had -- I would write a check, sure -- somebody who needed a check, I guess.

Q Could any check be issued without your signature on it?

A Only one signature, mine.

Q You had to sign every check that Vickie Coletti prepared, correct?

A She prepared them and I signed them.

Q Did you write any checks out for your own personal purposes out of the corporate accounts?

A I believe so.

Q To what extent did you write checks out for your own personal purposes out of the corporate bank accounts?

A Possibly my country club or -- you know -- maybe hospital, doctor bills, gasoline, sundry items.

Q Private school for your children?

A Yes.

Q Anything else?

A I imagine all personal items, yes.

(Continued next page.)

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Q What about your personal bank accounts at that time, were you writing checks out of those accounts for personal items too in 1967 and 1968?

A I think I answered that.

Q I think you said you did.

A Very limitedly.

Q In other words, you wrote more checks out of your corporate account for your personal purposes than out of your personal, is that it?

A Yes.

Q There was more money in these corporate accounts, was there not, than in the personal account?

A There was more of my own money in my corporate accounts which was owed to me.

Q And how much money was owed to y[redacted]

A Well, it would be my salaries, the salaries that I advanced to the corporation.

Q And how did you know how much salary it owed you from the corporation as a result of advances?

A Well, I generally know how much I make a year. We do keep a record of how much I make.

Q What record would you have?

A What record?

Q Yes.

A My income tax form would be my record, wouldn't it.

Q Mr. Canale gave you a copy of a tax return as he prepared them, didn't he?

A Yes.

Q You kept it in your office?

A No.

Q What did you do with it?

A They were kept at home. They were personal records.

Q You had occasion to look at the income tax returns to determine how much the corporations owed you, is that right?

A Not really. I never did look at them other than possibly that first page where my salary would be.

Q You did not look at any of the other pages on these corporate tax returns?

A No.

Q You have had a chance to look at them since, though, have you not?

A Yes.

Q They indicated that the corporations owed you substantial sums of money?

A Yes.

Q But you did not notice that when you signed these returns? Is that your testimony?

A Yes.

Q Did you ever ask Mr. Canale when the corporate returns were handed to you for signature how much money my corporations made during the year?

A No. We were doing pretty good.

Q How do you know that?

A From the pulse rate, from my accounts payable girl, I would know how we were doing.

Q From whom?

A From Vicky. The checks were not overdrawn. We were in pretty good shape.

Q Did you ask Mr. Canale how much my corporations owe me?

A No.

Q You never had any discussion with Mr. Canale about the stockholder advance account, did you?

A No. What year are you holding to?

Q 1966.

A No.

Q 1967?

A No.

Q 1968?

A No.

Q It was not until after the investigation began that you found out about the stockholder advances, is that it?

A Yes.

Q When that occurred did you ask Mr. Canale, "What is this stockholder advance account all about?"

MR. BENDER: Excuse me. When? What date? I object to the form of the question.

THE COURT: Let me have the question, Mr. Simon.

(Record read.)

THE COURT: Overruled. I will allow it. Do you understand the question?

A I think you are asking me in what year I asked him?

Q Did you ever have any conversation with him about it?

A 1969 when Mr. Jeremiah came into our office and started an audit it was discovered that there was an error in posting this money. And immediately it was corrected.

Q What do you mean by saying "it was corrected?"

A Well, during the period 1969 I was still collecting extras in my own name and they were going into the Eastern National Bank. And immediately all the extras that I collected were returned to the corporation.

Q What do you mean by "returned to the corporation"?

A He made I think a journal entry -- I am not sure -- I am not an accountant -- but he made a journal entry. And to my knowledge it wasn't stockholders advances then. If it was being posted for the first seven or eight months it came out and went into income.

Q Well, when this was called to your attention and you discussed it with Mr. Canale, did you tell Mr. Canale that all of the monies in 1967 and 1968 which are shown as advances or loans from me to the corporation were in fact income?

MR. BENDER: I object to the form.

THE COURT: Sustained as to form.

Q Did you have any discussion --

MR. RYAN: Withdrawn.

Q How was it that you first learned that the $162,000 which you had transferred from your personal to the corporate accounts was recorded in the books as the money owed you?

A After Mr. Jeremiah brought it to our attention.

Q And were you present when it was first called to your attention?

A No.

Q Who called it to your attention in the first instance?

A I think after several meetings with Mr. Jeremiah, then Mr. Canale and I sat down.

Q So it was just you and Mr. Canale at the time that you first learned that the corporate books showed that this money was treated as loans you made to the corporation? Correct?

THE WITNESS: Repeat the question.

Q So it was just at a meeting with you and Mr. Canale that you first learned that the $162,000 was not treated as income?

A Correct.

Q They were treated as loans that you made to your corporations?

A Correct.

Q Did you tell Mr. Canale that that was income?

A I told him the money belonged to the corporation and it should have been recorded as income. In fact I had a big argument.

(Continued next page)

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Q That was $162,000 of income, wasn't it?

MR. BENDER: I will object to it. We have already stipulated as to that.

THE COURT: All right, the correct amount being about $152,000?

Q Is that right?

A That is the amount, yes.

Q And you were going to have a fight with him about it, weren't you?

A Not a fight. It was just that I didn't understand the accounting procedures. And I in no way wanted to defraud the Government.

Q And what did you tell Mr. Canale when you discovered this?

A I said, "Mr. Canale, please, in 1969 will you change this method because we have now been notified it is income and I want to pay my taxes right."

Q And did you discuss with him 1967 and 1968 as opposed to 1969?

A Yes.

Q And what did you say to him about those monies recorded as loans from you to the corporations for those two years?

A That it was the same thing as 1969.

Q Did you say to Mr. Canale, "How could this happen?"

A Well, I don't know if those were the exact words.

Q What words did you use?

A Well, to tell you the truth, I was shocked.

Q What did you do after your shock subsided?

A I said, "How do you correct this?"

Q Well, you hadn't filed the tax return for the year 1969 at the time you had a discussion.

A No. And we corrected it that year.

Q All the returns were filed for '67 and '68? Correct?

A Yes.

Q So those returns were way out of whack, weren't they?

A I imagine so.

Q What did you say to Mr. Canale about the fact that his books showed this as loans and not income?

A I was shocked.

Q What did you say to him? Did there come a time when you were able to function without shock?

A Yes. I said, "What can we do? Can we pay this? I want to pay the Government. What can we do?"

Q And when Mr. Mazzella interviewed you on September 14, 1972 did you tell him that all of these monies came from extras?

A What all monies?

Q The $150,000 deposited into the corporate account and treated as a loan to you.

THE COURT: Representing the proceeds of extras. You might use the specific amount that you stipulated to so there is no question about which money you are talking about.

THE WITNESS: Could I relate to a conversation that we had?

THE COURT: Will you answer the question.

THE WITNESS: I can't answer it directly without a statement.

Q At the time that you were shocked by this revelation in 1969 did you tell Mr. Canale?

A Go ahead. You got me now -- in 1969 -- I have got to follow you. You are ahead of me.

Q In 1969 when you learned for the first time that this $156,000 was treated as --

THE COURT: I thought it was $152,000.

Now, let's have the figure so there is no question. I do not think it is important normally to

give the precise amount. But there were other advances made to the corporation. And I want to make certain that the witness understands you are talking about money that represented payment of extras.

There was $42,000 for 1967. There was $113,000 for 1968. And I added up to be $155,000 for both years. So when you refer to that figure, either 42,000 for 1967 or 113,000 for 1968, or 155,000 for both years, I know and I expect the witness will know we are talking only about those monies the witness said he put into his account that represented extras.

All right, Mr. Ryan -- would you like to suspend at this point?

MR. RYAN: Yes, I would like to.

THE COURT: We will take our luncheon break at this point. I will ask the jury to return at 2 o'clock. The jury is excused for lunch. I want the lawyers to remain in court.

(Whereupon, at 12:45 p.m. the jury retired from the courtroom.)

THE COURT: Gentlemen, I want your attention. I may charge on Count Two that if this is a constructive corporate dividend on the rate that the corporation would be required to pay on its dividends before

it distributed the monies to the stockholder as a dividend -- I would like that information. I can take it in one of two ways. I believe I can take judicial notice of it. I don't know whether the maximum in those years was 52 percent.

MR. VILARDI: 48 percent.

THE COURT: 48 percent in 1967 and 1968?

MR. VILARDI: 22 and 26 percent surcharge.

THE COURT: Now, the next question is the form of verdict. I don't know whether the lawyers have had a chance to look at it. I am unhappy about it because it is too long. I usually like to give a brief statement. But I don't know whether that will be satisfactory in this case.

MR. BENDER: I have looked at it and as far as I am concerned I have no objection except I think I found one typographical error.

THE COURT: Where is that?

MR. BENDER: And of course I struck out some of the counts that --

THE COURT: I struck out 5-A -- I am sorry -- 5 and 8 stricken.

MR. BENDER: May I get my glasses, your Honor.

In Count Four.

THE COURT: Count Four?

MR. BENDER: You are short a dollar.

THE COURT: Where is that? We might as well be accurate.

MR. BENDER: Way up at the top you have $1917.73. I think the indictment says 1918.

THE COURT: You are right. Anything else?

MR. BENDER: No.

THE COURT: Mr. Ryan, do you find anything wrong with it?

MR. RYAN: I find nothing wrong.

THE COURT: Well, I wish I could agree with you.

(Continued on next page.)

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(The following continued to be heard in the absence of the jury.)

MR. RYAN: Well, I find nothing wrong but it is a question of whether I like it.

THE COURT: Oh, well, you see all I want to do is give them the charges. I know you don't like the figures in there but of course they are in the indictment. And I am going to give it to them that way.

MR. RYAN: I prefer to have them in approximations.

THE COURT: I know. Does it say approximately?

MR. BENDER: No, it doesn't, Judge.

THE COURT: No, I am taking the language of the indictment. There is nothing wrong with that. I'm going to tell them the indictment is what counts in this part. I'm just going to give them the heart of it, that is all.

MR. RYAN: Fine.

THE COURT: Now, the next thing is I am having a little trouble with the definition. I tried to locate the statutory definition of income or reportable income. I found some definition under 7700 and something, 7707, but the statutory definition is totally unintelligible to me although it may

be simple for someone else.

MR. BENDER: I have to ask your indulgence, your Honor, but I just have to go to the bathroom. Could you give me two seconds.

THE COURT: Yes, because the important thing I wanted to ask you, and I have a couple of things and then I will come right back, but I want to know whether we can solve the problem of the jury. That creates a problem. I do not like having 12 jurors. I don't know if the defendant will consent to a verdict of less than 11.

MR. BENDER: I will consider it.

THE COURT: The other thing is on the pre-trial conference. Neither side ordered the minutes. That is why I do not have it, but you are quoting from what happened. I'm going to ask Mr. Simon to remain and try to tell me what the parties agreed upon.

MR. BENDER: The government concedes it in the request to charge and on the stand that it was a constructive dividend.

THE COURT: All right, in two and a half minutes I will be back on the bench.

(Short recess.)

(After recess.)

3 MR. BENDER: Is it all right to proceed without the defendant being present.

THE COURT: Well, there is nothing the defendant must determine except the possibility of accepting a verdict of 11.

MR. BENDER: I haven't had a chance to discuss it but I will do so during the luncheon recess.

THE COURT: I would appreciate your letting me know how you feel about it because that will help me decide as to what I am going to do.

MR. BENDER: Very good.

THE COURT: Now, as I say, I looked briefly to determine what the Internal Revenue Code describes and classifies as reportable income. I am really at a loss. I have asked my law clerk to try to find something on it or some of the reported cases. I know that in Dissenzo (phonetic), Judge Lombard made it quite clear that all the income that is embezzled from a corporation, not the usual diversion by a stockholder, and in the absence of anything else I will assume that the government must rest on the theory that this is a constructive dividend.

MR. BENDER: Right.

THE COURT: Is that your theory?

MR. RYAN: That is right.

THE COURT: And that is what the government will rest on.

MR. RYAN: We have no other choice as we see it under the law.

THE COURT: All right, that's what I want to know. Then I will stop looking. That's fine. So I don't even care what you said at the pretrial conference. I will assume that is so. Fine.

MR. RYAN: I'm sorry that I caused any difficulty. There is really no other way we can see it.

THE COURT: All right, I will try to go over the requests to charge. They are quite lengthy. I do not know how much longer you have with Mr. Hornberger.

MR. RYAN: Not much.

THE COURT: Is there a possibility that you might be able to sum up today.

MR. RYAN: Surely.

MR. BENDER: I may have one witness.

MR. RYAN: The expert witness?

MR. BENDER: A very short witness.

MR. RYAN: The expert?

THE COURT: Short or tall, what kind of

witness do you have.

MR. BENDER: As a matter of fact, I think he is middle-sized.

THE COURT: We will take a middle-sized witness too. But the point is I think it is unrealistic to charge unless --

MR. BENDER: I think we should sum up on Monday.

MR. RYAN: If you're going to charge on Monday I would rather have summations then.

THE COURT: No, I won't do that. I want to have the full day, Mr. Ryan. I do not think there is any advantage or disadvantage if you both sum up the same day.

MR. RYAN: All right.

THE COURT: I will have the jury come in and give them the charge and make sure that they have the full day togo over it. Now we are talking about eight counts. And I am telling you that jurors these days, and by these days I mean with our expanded base, they go over each count. You can witness what is happening on the 6th floor. I think they are in the seventh or eighth day of deliberations.

MR. BENDER: It is more than that I think

6 according to the papers.

MR. RYAN: I think two weeks.

THE COURT: I have even forgotten when they started. So I am in trouble if this case goes beyond Tuesday.

Now, I don't know how many others have plans. That is why I say I want at least one alternate.

MR. BENDER: Very well.

THE COURT: Otherwise I may want to keep the jury as it is and come in and charge on Saturday. In that event we have other problems. We have management problems. You have to air-condition the building. And we have problems with GSA and other agencies, and we have got energy saving and so forth, and we have to bring the clerks in. But if that is the alternative I have to do it.

MR. BENDER: There may not be that alternative.

I want to say one thing, your Honor, I appreciate your desire to accomodate juror number 3. And this is something I have notdiscussed with Mr.Ryan yet. But for one day that it may well be, or two days, she could suspend her vacation.

THE COURT: I would like that but she seemed pretty definite.

MR. BENDER: This is something that Mr. Ryan

and I have not discussed.

THE COURT: She said she had plane tickets to go to New Orleans.

MR. RYAN: You can go there any day. There are three flights a day.

THE COURT: Well, all right, I would urge her to do that and tell her how important it is, but then we have got the other problem. Suppose they don't agree on Monday, and she says she will postpone it to Tuesday, and Imust advise her that it can't be until Wednesday that I will release her. Now she knows and I know the problems we have with air traffic for the July 4th weekend, and whether she can get other reservations. We do have all these social problems.

(Continued next page.)

(The following continued to be heard in the absence of the jury.)

MR. BENDER: Well, then, maybe what we can do is consider -- while they are deliberating could we hold the alternate.

THE COURT: There is no way of doing it. I wouldn't want to do it. No, the alternative would have to be that if we go that way and she insists she can't remain beyond Monday, if the parties agree to take a verdict of less than -- take a verdict of 11.

MR. BENDER: Okay.

THE COURT: I'm trying to avoid a mistrial obviously.

MR. BENDER: I agree. We don't want any either.

THE COURT: I'm also trying to avoid any sense of having to get a verdict out immediately. I could possibly charge the jury this afternoon at 5 or 6 o'clock,, and if they come up with a verdict by 7 o'clock you will not feel happy because you would feel they didn't give it full consideration.

MR. BENDER: I think we should have time over the weekend and that the charge should be done on Monday.

THE COURT: Oh, charging on Monday, I would like to do that. I need time on this.

MR. BENDER: Well, we would like time to sum up.

MR. RYAN: I have a supplemental request I would like to submit.

MR. BENDER: If Mr. Ryan and I agree on that maybe we can sum up on Monday and you can charge.

THE COURT: How long will the summations take.

MR. BENDER: I don't expect to be more than a half an hour or an hour.

MR. RYAN: I don't think I will be more than an hour.

THE COURT: Well, half an hour to an hour and an hour, that is roughly two hours.

MR. BENDER: And your charge --

THE COURT: I think 35 minutes --

MR. BENDER: So the jury will have it after what, 1 o'clock.

Mr. Ryan shouldn't have any trouble with a jury verdict in 20 minutes.

(Thereupon at 1:05 o'clock p.m. a recess was taken until 2 o'clock p.m..)

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AFTERNOON SESSION

MR. BENDER: When did you want to have this discussion?

THE COURT: I thought you wanted me to ask questions of Juror Number 3.

(Jury present.)

THE COURT: Come to the side bar.

(The following transpired at the side bar.)

THE COURT: I was under the impression that you first wanted me to ask questions as to whether she could stay.

I'd just excuse her, because we might have an unhappy juror.

If you want me to ask questions of her, I will do that.

MR. BENDER: I would like to follow your thoughts, that we discussed, that she should stay until Tuesday night and if the jury gets the case --

THE COURT: I will ask her that.

MR. BENDER: I have talked to my client --

THE COURT: Then we will go on with the case.

MR. BENDER: I have spoken to my client in accordance with your suggestion -- you said you would only do that if the jury did not agree by Tuesday -- that you'd let her go.

THE COURT: I thought Monday.

MR. BENDER: Tuesday.

THE COURT: I am leaving Wednesday morning.

MR. BENDER: Then do it Monday, she could leave Tuesday.

THE COURT: Monday night.

MR. RYAN: Why don't you make inquiry now.

MR. BENDER: I want to tell you what I asked my client. My client will agree to go ahead with 11. I have never done this before, but I think under the circumstances --

THE COURT: Would you agree if he says okay for Monday -- that she will stay until Monday night, then the parties agree they will take a unanimous verdict of 11?

MR. RYAN: Surely.

(The following transpired in open Court.)

THE COURT: Juror Number 3, I would like to ask you a few questions as to your commitments.

JUROR NUMBER 3: Yes.

THE COURT: Would it be terribly inconvenient if I asked you to start deliberations on Monday?

JUROR NUMBER 3: I would have to cancel my whole vacation.

THE COURT: It is a package deal?

3 JUROR NUMBER 3: Yes, your Honor.

THE COURT: All right, we will continue with the trial and we will have another conference later and see what happens.

E L M E R E. H O R N B E R G E R, resumes the stand and testifies further as follows:

MR. RYAN: I have no further questions.

THE COURT: Mr. Bender.

REDIRECT EXAMINATION

BY MR. BENDER:

Q Mr. Hornberger, in connection with the visit of Revenue Agent Gerimia and the audit that he conducted in 1969 and 1970 -- I think 1970 -- were the checkbooks of the corporations made available to him?

A Yes.

Q I think the job files and the other records of the corporations were likewise made available to him; is that correct?

A Yes.

Q Now, this flood which you referred to when you were asked about where some of the records are today --

A Yes.

Q -- the flood did not effect the actual corporate books and records that are here in evidence?

A No.

Hornberger-redirect

Q About when did thatflood occur?

A Well, we had several floods in that building.

MR. BENDER: I will mark this for identification and see if you can refresh your recollection from it.

THE CLERK: Document marked defendant's exhibit Y for identification.

(So marked.)

Q I show you that document and I ask you to look at it and see if it refreshes your recollection as to when the flood occurred, to the best of your recollection?

A Yes, it was about September, October of '72.

Q That document was a letter or an affidavit which Mr. Ryan had requested, did he not?

A Yes.

Q And that is an affidavit sworn to by you --

MR. RYAN: Objection.

THE COURT: Excuse me.

(Document shown to the Court.)

THE COURT: Objection sustained.

Q Now, was there any law suits instituted against you in connection with that flood?

A Yes.

Q Is there one presently pending, to your

knowledge?

A I think it was settled with the insurance company, but it may still be pending.

Q Who sued you?

A One of our tenants.

Q What did they sue you for?

A Loss of records, furniture, practically their whole office.

Q As a result of what?

A O f a flood that was over 5 foot deep.

Q Was that the premises where you had these records stored?

A Yes.

Q Did you yourself make any claim on the insurance company for any reimbursement for any losses that occurred as a result of that flood?

A No.

Q Then the only claim that was made with respect to it was these people who had sued you?

A Yes.

MR. BENDER: I want to ask if we can't have these 50 contracts marked as one exhibit?

THE COURT: Any objection?

MR. RYAN: No.

THE COURT: All right, they may be marked.

THE CLERK: So marked --

THE COURT: You don't intend to refer to them specifically?

MR. BENDER: I will sort of lump them together.

THE COURT: If you do, ask the clerk to give that one a separate number.

MR. BENDER: My co-counsel tells me there are about 50.

THE COURT: 50?

THE CLERK: 50 contracts marked defendant's exhibit Z for identification.

(So marked.)

MR. BENDER: Your Honor, I have been advised that these 50 contracts represent purchasers whose names appear on the schedule in evidence -- Mr. Mazzella's schedule.

THE COURT: Does Mr. Ryan agree?

MR. BENDER: Subject to his rights to check these against the list.

THE COURT: On that representation, they are marked in evidence. If there is an error, Mr. Ryan will call my attention to it.

THE CLERK: So marked in evidence.

(So marked.)

BY MR. BENDER:

Q Mr. Hornberger, these contracts which are in evidence, did you examine these contracts beforehand?

A Yes.

Q And whom did you obtain these contracts from?

A Mr. Wolfsont.

Q With respect to these individuals, what is your recollection -- are these individual buyers from whom extras payments were received as indicated by the government in exhibit 145 in evidence?

A Yes.

Q And what do these contracts reflect with respect to extras, if anything?

A They spell out the extras specifically, either on the front page or an addendum attached to it.

Q While this may be repetitious, these contracts -- who did you give them to when they were entered into between the corporations and the buyers during 1967 and 1968?

A Charlotte Waugh.

Q These are the contracts that were given to Charlotte Waugh?

8 Hornberger-redirect

A Not actually -- not these -- the ones that I had. Those belong --

Q You mean the copies?

A When we sign a contract there are three copies, Mr. Wolfsont keeps one, we get one and one goes to the bank.

Q A copy of this contract is what you would give to Mrs. Waugh?

A Yes.

Q And she in turn would give it to Vicky Coletti?

A Yes.

THE COURT: You said she would forward it to the bank.--

THE WITNESS: There are actually four, one for the other attorney, one for my attorney, one for my office and one to be sent to the lending institution.

One would remain in our records.

THE CLERK: I have 64.

THE COURT: The clerk counts 64 contracts.

MR. WOLFSONT: I stopped at about 50.

There may be some duplicates.

THEWITNESS: There may be.

THE COURT: At any rate, there are 64 contracts

9 Hornberger-redirect

I do not know whether there are duplicates or not.

MR. BENDER: I have a schedule that was prepared under my supervision of three pages, which may assist the government, the Court and thejury, which lists all the contracts, the names and the corporations and thecontract dates.

THE COURT: We will count the number listed.

(Document given to Court.)

THE COURT: I have 60 names here.

As a matter of fact, the total is on the last page and it says 60.

MR. BENDER: He thought it was 50.

MR. WOLFSONT: I prepared that quite late last night.

THE COURT: Any objection to marking?

MR. RYAN: No objection.

THE COURT: This is the defendant's version of the summary of those contracts on the relevant items, right?

MR. BENDER: That is correct.

THE COURT: This isn't evidence. The evidence is the contracts. This is for reference by the jury.

THE CLERK: So marked defendant's exhibit AA

in evidence.

(So marked.)

MR. BENDER: I have no further questions.

THE COURT: Anything further?

(Continued on next page.)

RECROSS EXAMINATION

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BY MR. RYAN:

Q Mr. Hornberger, do you recall the ledger book that Vicky Coletti kept and made entries when she would get a contract under your procedure?

A Do I recall what it looked like specifically?

Q The book, do you remember she made an entry in a record?

A Yes.

Q And that was a book similar to the ones that have been marked 129 that you produced at this trial -- similar in its physical appearance?

A Yes.

Q And do you have that book that Vicky Coletti had?

A No.

Q Why not?

A That was with all the records stored in the area that was flooded.

MR. RYAN: No further questions.

MR. BENDER: Nothing further.

THE COURT: You may step down.

Call your next witness.

MR. BENDER: The defendant rests.

THE COURT: Does the Government have any rebuttal?

MR. RYAN: I have a few schedules that I want to offer into evidence, schedules attached to documents in evidence. I want the schedules in evidence for the record, so the Jury can use them.

THE COURT: The schedule is not in existence now or in evidence now? You say the records are in evidence?

MR. RYAN: The schedules are attached to the records in evidence, but they are marked for identification.

THE COURT: Show them to Mr. Bender so he knows what you are talking about. Consult with him privately.

(Pause.)

MR. BENDER: Your Honor, Mr. Ryan has made the schedules available to me beforehand with these cancelled checks and some deposit tickets. I have not checked the checks against the itemizations on the schedules. I am willing to permit them to go into evidence, if Mr. Ryan wants them, subject to my right to check them over.

THE COURT: They may be marked under the conditions so stated by Mr. Bender.

Again this is not the evidence. It is a summary. You must keep that in mind. You must be ready to look at the original documents, the underlying records for a determination of the facts in this case and only use the summaries so you may know where to look. That is what it is, just a guide.

MR. BENDER: I only notice that there is some 1969 figures here and I frankly don't see the materiality of that at all. I think they should be expunged from the schedule.

THE COURT: Do you want to argue that, Mr. Ryan?

MR. RYAN: No, I think the '69s are relevant--

THE COURT: Don't tell me why. Do you want to argue it?

You say it should go in?

MR. RYAN: Yes.

THE COURT: The Jury may be excused.

(Jury leaves Courtroom.)

THE COURT: Is there any testimony or exhibits upon which the summaries are based?

MR. RYAN: Yes.

THE COURT: What is that?

MR. RYAN: First of all, the defendant himself testified that he advanced monies from his personal accounts to the corporate accounts in the year 1969.

MR. BENDER: That was only on cross-examination.

THE COURT: Did he say how much, when?

MR. BENDER: No.

THE COURT: What do the summaries reflect?

MR. RYAN: They reflect the checks from Hornberger's personal account.

THE COURT: Is that the only basis?

MR. RYAN: The checks are here and they are in evidence.

MR. BENDER: No, they are not in evidence -- not the 1969 checks.

MR. RYAN: They are not?

MR. BENDER: I don't think so.

MR. RYAN: I thought that the '69 checks were in evidence.

MR. BENDER: I do not think so.

THE COURT: All right, let the '69 portion be expunged from the summary.

Since the Jury is out, you heard the problem.

MR. BENDER: I was just reminded by my client that the insurance man who paid the tenant is coming down here and I was going to use him merely to corroborate.

I will ask Mr. Ryan if he will stipulate.

THE COURT: How about the date of this flood?

MR. BENDER: Around '72.

THE COURT: Did the defendant testify to that?

MR. BENDER: He refreshed his recollection from the affidavit.

MR. RYAN: I cannot stipulate to that.

MR. WOLFSONT: I can testify, I defended the case.

THE COURT: You say he's on his way?

Where is he?

MR. BENDER: He called him at 11:00 o'clock and he said he would be here.

MR. WOLFSONT: I could give you the name of the case.

THE COURT: I cannot stipulate for any party and I do not insist on stipulations.

If Mr. Ryan wishes, that's it. If the man is on his way, we will just wait for him.

MR. BENDER: Let's dispose of the other problem.

THE COURT: The other problem is more significant.

MR. BENDER: May I speak to him?

THE COURT: You can discuss it with him at length, if you want.

Do you want a recess?

MR. BENDER: I do not think it will be necessary.

THE COURT: Can you physically cut it off? If you cross things out, the Jury might be curious.

MR. RYAN: We might be able to do it.

MR. BENDER: I have one other question. Is this schedule taken from the cash receipt journal or the general ledger or both?

MR. MAZZELLA: I believe the cash receipts.

MR. BENDER: Miss Paterno testified when she took the records, she said the stockholders advances had a cash account in the cash receipt book and posted it into the general ledger.

MR. MAZZELLA: I believe it's the cash receipts.

MR. BENDER: I saw that on top, but I was questioning whether it was or not.

MR. RYAN: I offer it, pursuant to the Court's instruction, 108A, 109A, 110A and 111A.

THE CLERK: So marked in evidence.

THE COURT: Would you please discuss the Jury question.

MR. BENDER: No question.

THE COURT: I am going to ask you to sign a stipulation. I will excuse Juror number three. I will tell Alternate Juror number one that she is to take the seat of Juror number three.

I will draw a stipulation saying that in the

event a juror is excused, that the parties will accept a unanimous verdict of eleven.

It's a verdict of twelve and I wouldn't want anything less, unless it cannot be helped and the juror doesn't return for good cause.

MR. BENDER: I have spoken to both co-counsel and my client, Mr. Hornberger, who will agree to such a stipulation and so will I.

THE COURT: Now, there is no sense the Government resting, because we are waiting for a witness. As soon as he gets here, let me know.

MR. RYAN: I will file the request to charge.

THE COURT: On that stipulation, the case will go over until Monday. We will sum up Monday, but I want to go over the requests to charge today, so we don't waste any time on Monday.

THE CLERK: Government's supplemental request to charge marked Court's Exhibit 3 for identification.

(Recess taken.)

(continued on next page)

(The following occurred in the presenc e of the jury.)

THE COURT: Does the defendant rest?

MR. BENDER: Yes, your Honor.

THE COURT: You have no other witnesses? You have no other witnesses?

MR. BENDER: No. We had one but he hasn't arrived.

THE COURT: The government rests?

MR. RYAN: Yes sir.

THE COURT: Juror number 3, you are excused. You can go on your trip. You don't have to leave the Courtroom now.

The case will continue Monday at 10 o'clock.

Now we have 12 jurors left on this jury and it is most important that every one of you get here. I don't like to be over-dramatic but just to tell you or give you an inkling as to how I feel about it, if you have to crawl here on Monday, get here. Very important.

We'll start the case on Monday or continue the case on Monday.

The evidentiary part of the case is over. On Monday Mr. Bender will address you for the defendant and Mr. Ryan for the government and then

I'll charge you on the law.

When you arrive Monday morning, you will find a menu and the slips asking each juror to note the sandwich and the beverage and dessert that you want. On Monday you will have lunch at the expense of the government.

I am not sure whether I will get to charge you before lunch or after. The possibility is after lunch.

Then you will have the rest of the day to deliberate on the verdict, and if you cannot agree on the verdict on Monday, then deliberation will continue on Tuesday.

So now that we have a weekend, it is particularly important that you do not think about the case, nor talk about the case. Do not come to any determination. Wait until you hear what the lawyers have to say about it. Wait until you hear the charge from the Court.

When you come into Court on Monday morning, do not talk about it among yourselves.

Now, try to get here promptly, which means about 15 minutes before 10 o'clock, to give you the opportunity to register and come to the jury room adjoining the Courtroom.

3 Alternate numberl, when you come in on Monday, you will take the seat vacated by Juror number 3.

The jury is excused. Have a nice weekend.

(The following occurred in the absence of the jury.)

MR. BENDER: Your Honor, can Mr. Hornberger be excused?

THE COURT: Yes.

We are just going to pass on --

MR. BENDER: On the requests.

THE COURT: On requests. I'd rather that he wait until the jury has left the building.

MR. BENDER: I'm sorry. Yes.

THE COURT: And then if he does not want to stay for the rulings on the requests, of course he is free to leave.

I have approved the stipulation signed by the defendant and the lawyers agreeing to a unanimous verdict of 11. I just hope that we have 12 jurors, and that's why I said what I said.

MR. BENDER: Thank you very much, your Honor.

THE COURT: All right, let's go -- have you gone over the --

MR. BENDER: Yes, I have.

THE COURT: Do you object to any of the requests in the government's original requests to charge?

MR. BENDER: Yes, I do.

THE COURT: Which ones.

MR. BENDER: Request number 2.

THE COURT: Well, I am not going to say "If the accountant was deliberately not furnished full information," but I intend to say something, that he cannot justify criminal liability if it's found by showing that the accountant made the return, if the government has proved beyond a reasonable doubt thatthe accountant's failure to make a correct return was due to his willful conduct. His refusal to give the information.

MR. BENDER: I would take no exception to that charge.

THE COURT: All right.

MR. BENDER: In that form.

THE COURT: I intend to charge a little differently. I had better put down what I said because I haven't made notes.

MR. RYAN: We are getting a daily on this.

THE COURT: Daily. I want to take this home with me.

MR. RYAN: We'll order immediate.

THE COURT: Just read back something of what I have said since they agreed to it.

(Record read.)

MR. BENDER: Due to the defendant's willful conduct.

THE COURT: His refusal or failure to supply the correct information. It probably will not come out that way. I don't promise to charge in the terms in which I grant a request because sometimes I do not follow what I say, what I tell you I intend to say. Some of it is extemporaneous.

MR. BENDER: In effect.

MR. WOLFSONT: This (indicating) is our last witness, your Honor.

MR. BENDER: It's too late.

THE COURT: 3:15.

Would you take a stipulation based on what he would say?

MR. RYAN: I'd like to hear what he has to say.

MR. BENDER: I beg your pardon, Mr.Ryan?

THE COURT: Wait,

MR. RYAN: I'd like to hear what he has to say.

THE COURT: Would you come forward, please?

MR. BENDER: Can we just talk to him a minute, your Honor?

THE COURT: Then he had better wait until I'm through

MR. BENDER: Do I understand, your Honor, if you agree that -- with the request, that what you are saying, I think I understood you, is that what you intend to do is give the substance of the charge requested but not necessarily in that language?

THE COURT: Exactly, but in this particular framework, I also intend charging on his failure to know what is in his own books of account, and I intend also saying that that is not excused if he knowingly refused to get the information from available sources. In other words, he cannot claim ignorance of what is in the books of the corporation if the jury finds that he, again, he willfully and knowingly and deliberately refused to look at the books.

MR. BENDER: I only want to say to you, your Honor, when you frame it in that language, you may find that you are going to impinge upon the concept of willfullness in a tax evasion case, which is kind

of unique in itself. And as given expression by the Supreme Court of the United States in the very recent opinion, United States against Bishop.

THE COURT: I am aware of it.

MR. BENDER: Which came down this year. It all depends how that gets across because the way in which you are saying it, it might be misconstrued by this jury as indicating negligence or --

THE COURT: No. I have given the charge in any number of cases where knowledge is an essential element of the crime and where the defendant claims that he or she did not know. For example, narcotic cases, know that it was narcotics and refused to learn what it was and deliberately didn't want to know, said don't tell me. So it's an accepted principle in law and that is the thought and I intend charging that.

MR. BENDER: What I had in mind was that if you applied that type of case to this, I would have to take an exception because whatever conduct he engages in must be conduct which not only is with an evil intent or bad motive but has to be directed to a tax evasion motive.

THE COURT: I disagree with the statement of

8 that principle in the context of what we are talking about. I do not deny that or I agree that the essential element of the crime charged is specific intent to evade a substantial payment of taxes, and that is whatthe Courts have been saying when they talk about criminal intent in an income tax evasion case.

However, when a defendant comes to the stand and says "I don't know what is in the books of the corporation," and what -- if what is in the books of the corporation bears on the essential elements of the crime, I need not say to them that the government must also prove that when he refused to look at the books, that he did it with an intent in mind to evade income taxes. This is a question of knowledge.

In other words, his conduct in refusing to acquire the information, being aware that he doesn't want to -- he shouldn't look at the books because the books might reveal what he doesn't want to see, that concept. He's charged with knowledge of what's on those books. Do you disagree with that proposition?

MR. BENDER: I don't think in this case he is charged with knowledge of what's on the books.

I think that may be true in a civil case, because whatever his employees do in the regular course of business --

THE COURT: No. I have charged it in criminal cases.

MR. BENDER: Judge, I only -- if you ask me do I agree, I only have to say to you in that framework, I most respectfully --

THE COURT: When you say you do not like the language as I tell lawyers, I try to satisfy all our litigants, if I can. You tell me what language, if you agree with the principle, you tell me what language is appropriate.

MR. BENDER: I thought that I mentioned it, but you disagreed with me.

I think that, as I indicated in the -- that -- in one of the requests, theonly way in which Mr. Hornberger can be charged with any knowledge of what the books contain is if there was evidence beyond a reasonable doubt that he advised or instructed or supervised the entries in the books or the -- that he had knowledge, specific knowledge, that there were no entries of extras or that they were making entries and only insofar as we're talking about whether the government has proven that

10 he received a constructive dividend.

THE COURT: All right. I will try to get a memorandum of law up for you on that, but this is a collateral matter. It is not one of the essential elements of the crime and we are not limited to the specific intent required of the essential element of the crime charged.

I just told you what I intend to do and the probability is I will charge that. I only say it because it seems to have some relationship to what knowledge the defendant had.

What is the next one you disagree with?

MR. BENDER: 3.

THE COURT: You have no subsequent acts, do you?

MR. RYAN: Yes. The false statement to Mazzella.

THE COURT: That's not subsequent acts. That's an exculpatory statement. I've got that marked on my own notes.

MR. RYAN: All right. That's what I meant to say.

THE COURT: All right. So this is denied.

MR. RYAN: In other words, you're going to give a charge on that subject?

11 THE COURT: An exculpatory statement or an admission that he made. The exculpatory statement was that he got the money from his mother.

MR. RYAN: His mother.

THE COURT: If they find that is wrong, then they can --

MR. RYAN: Consider that.

THE COURT: -- consider that.

MR. RYAN: Circumstantial evidence.

THE COURT: With all the other evidence.

MR. BENDER: There is conflicting evidence on that.

THE COURT: You can argue that in your summation. I do not give summations. I just give the charge. I give the principle.

MR. BENDER: No. I mean if you're going to say that he -- if one side says he said something and you're not going to tell the jury, however, on the other side, the other side said something different --

THE COURT: That is just what I am going to do. I am going to say what the government says because I am not presenting this as a fact determination but I am presenting this as an example of the principle, the principle being that if

12 someone makes a statement upon being faced with a charge and the statement tends to show his innocence, it's exculpatory, and if the jury finds that that statement is false, they may consider that as one of the circumstances in -- together with all the other circumstances, to determine whether it shows a consciousness of guilt.

MR. BENDER: Yes. I don't disagree with you, your Honor. But I say -

THE COURT: I am not going to say, "Well, remember Mr. Hornberger's testimony."

MR. BENDER: No. I think in all fairness, if I may say this, when you do charge that the government claims such and such, you should indicate, however, that there is evidence by the defendant to the contrary.

THE COURT: All right. I am telling you I will not do it and I say to you, that is a matter for you to tell the jury. You know what I am going to charge and you can say to the jury, "Now, about this statement, Mr. Hornberger denies it and I want to call your attention to it." That is your job. My job is just to charge on the law, and I do not intend to marshal the facts.

MR. BENDER: No. But in this instance, if

12 I may just press this point a minute, your Honor, since you're asking the jury to make a finding of fact --

THE COURT: I am not asking them that at all.

I am saying there is evidence, if you believe it, then.

MR. BENDER: There is also to the contrary.

THE COURT: I will not say it, and you have an exception.

MR. BENDER: And you should decide --

THE COURT: I won't say it and you have an exception. I have never done it in any criminal case. I have told the lawyers, if I start giving all the evidence in the case, both sides are going to tell me that I haven't given it all, and I refuse to give it on this issue because it might be used as an example.

It is not necessary that the government prove an evasion of all the taxes charged. Sufficient if any substantial portion -- well, I intend saying that.

MR. BENDER: I have objected to that.

THE COURT: Why do you object to it?

MR. BENDER: Because of the definition of

14 what -- you know, a substantial portion of attacks. I think that the --

THE COURT: How do you define substantial part?

MR. BENDER: I think what you told the jury yesterday, when you indicated that you had granted judgment of acquittal on those two counts would be satisfactory to me.

THE COURT: All I did was use the word "substantial." I said I found that it wasn't substantial as a matter of law.

What I intend saying is that it is not necessary for the government to prove that the defendant evaded the precise amount of tax alleged in the indictment. They must prove beyond a reasonable doubt that he evaded a substantial amount of the tax.

Do you object to that charge.

MR. BENDER: No, I will not object to that.

THE COURT: All right. Request 5.

(Continued on next page)

MR. BENDER: I object to that. I think the Government's supplemental request, I think states the principle of law a little more clearly and I think I would have less fault to find with the supplemental request than request No. 5.

Am I wrong about that?

THE COURT: Do you agree that 5 should be out znd 10 substituted?

MR. RYAN: No.

THE COURT: Well, I am not going to give both.

MR. RYAN: Well.

THE COURT: Since I --

MR. RYAN: If I had a choice, I'd say 10, because I think it would be more helpful to the jury.

THE COURT: Well, all right. You do agree with 10, don't you?

MR. BENDER: Helpful to the Government or --

THE COURT: I don't care whether it's helpful or not. I explained that before.

MR. BENDER: Which is 10?

THE COURT: That's the one that you said you agree with.

MR. BENDER: No. I said I would have -- I would find less fault with it, your Honor.

THE COURT: Oh, all right.

Let's go to that.

What fault do you find with 10? I would say that the language in this -- in which this is couched I would think that you gave it to the Government.

MR. BENDER: I didn't, as a matter of fact.

THE COURT: You did?

MR. BENDER: I did not. I told Mr. Ryan my opinion of it beforehand but I'm sure he will not tell it to you, your Honor, on the record.

Mr. Ryan?

THE COURT: I don't think that I am going to go into all the details.

MR. RYAN: The factors?

THE COURT: That's part of your summation. I might very well go up to the first paragraph on the second page of 10. You can, in your argument, go into all the circumstances.

MR. BENDER: I would take no exception to that.

THE COURT: All right.

Coming back to the original request No. 6.

MR. BENDER: I will object to that because I think each count is separate and it should be so indicated to the jury.

THE COURT: Oh, I'll indicate it but I don't have to be repetitious.

3 MR. BENDER: No.

THE COURT: If it's the same charge, why should I say as to Count 3, that the gross income derived in the manner is a -- would be income to him if it were constructive dividend. And in Dotal, Horn, and so forth.

MR. BENDER: I think the line -- the last of the line in the fifth -- on the -- in the first paragraph, subject to a corporation tax, is irrelevant.

THE COURT: I thought that you wanted that charged. You wanted me to say, and I intend to -- well, I intend to say --

MR. BENDER: Excuse me. I thought this was 9 and 10. I'm sorry. I apologize.

THE COURT: Oh. I intend to say that.

MR. BENDER: Yes.

THE COURT:"The monies, if you find that these extras -- these extras that were put in Hornberger's account were constructive dividends, keep in mind that before the corporation would pay the dividend to Mr. Hornberger, there would be deducted therefrom, a tax equal to 48 percent. And the importance of that is for you to determine whether what he did receive --"

MR. BENDER: Is this the substance of the

charge that you are going to give on the elements of?

THE COURT: I'm sorry. You are right. That would be on Counts 1 and 2.

MR. BENDER: No. On Counts 3 to 8.

THE COURT: No. 3 to 8 I won't be talking about the deduction for corporate taxes before paying the dividend to Mr. Hornberger.

MR. BENDER: That is correct.

THE COURT: That would be on Counts 1 and 2.

MR. BENDER: I am talking only about -- here you would indicate wilfullness, the affirmative act required and it was a substantial tax due and owing.

THE COURT: Of course.

MR. BENDER: Yes. That's what I am saying. It's not in here.

THE COURT: Oh, I don't know. This isn't the entire charge.

MR. BENDER: That's all that I see in the Government's with respect to Counts 3 to 8, so I didn't know whether you were --

THE COURT: Of course, criminal intent must be shown and I'll charge it in the same manner as 1 and 2.

That's constant for all the counts, excepting

9 and 10.

MR. BENDER: Well, I think, however, that to the extent that Counts 3 through 8, with the exceptions -- with the exception of the two that you -- are out, we shouldn't make a distinction that all that the Government is talking about is a substantial portion of income.

THE COURT: I am saying that, of course, this is not the shole charge.

MR. BENDER: Oh.

THE COURT: They will get all the essential elements and criminal intent need be shown, that he knowingly and willfully intended to evade a substantial tax due from the corporation.

MR. BENDER: Basically --

THE COURT: All that goes in.

I say, that's standard.

MR. BENDER: Very good.

THE COURT: Now, interestingly enough, the Government is asking for something that I didn't think you should have.

MR. BENDER: What's that? On which one? 7 or 8?

THE COURT: On Counts 9 and 10.

MR. BENDER: Oh.

6 THE COURT: U. S. v. Hoover, holds that 900 the issue of materiality in a 76 -- rather, 7206 violation, is for the Court. And I charge that in U. S. v. Vario -- and there they are saying in determining whether they were false as to a material matter.

How do they know what's material?

MR. BENDER: Was Vario a tax case?

THE COURT: It was a perjury case under 7206, yes.

MR. BENDER: I don't think anybody is going to fight with the fact that if -- if there is alleged omitted taxable income from a return, that that is not a material matter, in any event.

THE COURT: No. The elements, as I understand it, for 7206 is that the defendant know that it was false and that knowing it was false, he nevertheless included in, that he knew that the income was greater and tell what the greater amount was. Knowing that the income was greater, he inscribed the lesser amount. But I don't charge that they must find that's material because that's an issue for the Court.

MR. BENDER: I think also, your Honor, I have --

THE COURT: If I am wrong, I misinformed one of the other judges in this court who has an income

7 case going on this floor. So we will get two reversals on the same day.

MR. BENDER: I would not agree with you that the materiality is an issue for the Court, but I have to defer to you, if you say.

THE COURT: Get me the --

MR. BENDER: If it was specifically raised --

THE COURT: Get me the VArio file.

MR. BENDER: If it was specifically raised in the Second Circuit, and affirmed, of course, but that would not preclude me from taking an exception unless there has been a definitive ruling, although I know that I would be out on the Second Circuit opinion.

THE COURT: I don't intend to charge that it's a fact questionfor the jury unless the Government asked me to do it.

MR. RYAN: We will not. If the case U.S. v. Hoover so states the law --

THE COURT: I'll give you the citation.

MR. BENDER: Is Hoover Second Circuit?

THE COURT: YEs.

I shouldn't say yes, I'm not clear but I'll get the citation for you.

MR. BENDER: Yes. I'm not familiar with the

8 case. It sounds like it belongs in the Ninth Circuit. Herbert Hoover. Also, your Honor, I think you ought to charge on the venue point, the jurisdiction point. While there is no dispute here, I think venue is a fact which the jury has to determine and neither of us have submitted that issue to you.

I do think it should be mentioned. I think also one of the elements is, as I've requested --

THE COURT: Wait.

Did the Government have to prove that this was filed in this District?

MR. BENDER: Yes.

THE COURT: What about the tax returns, does it show the stamp?

MR. BENDER: The Second Circuit has held that even if it wasn't filed in this District, if it was prepared in this District, then under the Continuing Crime Statute, it could be brought in the District where it was prepared or in the District where it was filed.

I'm not raising an issue about improper venue here.

THE COURT: Do you want me to charge that that's one of the essential elements of the crime?

MR. RYAN: I object.

9 MR. BENDER: It is -- it is.

MR. RYAN: It is not an issue in the case. It is confusing.

MR. BENDER: But it doesn't make any difference. There may be a lot of facts which are undisputed which the jury has to pass on.

THE COURT: THat may be true but I don't want to give the jury facts that aren't within their jurisdiction because it serves only to confuse.

MR. BENDER: But, Judge, you know that venue is an issue of fact.

MR. RYAN: No.

THE COURT: It may even be an issue of fact. The question is whether it's one for the Court or the jury and jurisdiction, in my opinion, is always for the Court.

MR. BENDER: Government must prove venue.

THE COURT: I am not saying they don't.

MR. BENDER: And the jury should pass upon it.

THE COURT: That's the question.

MR. BENDER: If it's undisputed, you could tell them it's undisputed. I am only doing this -- I am only saying this to you -- I mean, you are the Judge.

10 THE COURT: What should I tell the jury?

MR. BENDER: Simply that one of the elements of the crime is that the return was made and subscribed either in the district -- in this district, the indictment charges that it was made and subscribed in this - - under the jurisdiction of this court.

THE COURT: You say you won't concede that and withdraw it from the jury?

MR. BENDER: I can't concede that. It's an issue of fact for the jury. I can't concede it. I don'tthink you'd want me to concede it.

THE COURT: Don't ask that question.

MR. BENDER: Who knows what happens, and I may be replaced sometime and my client may take a position that I was incompetent. I can't do that.

THE COURT: Well, if every competent lawyer was restricted in conceding the obvious, God help the law profession. Because there are many concessions that help a client.

How about the other concessions you made? Are you going to be criticized for those?

MR. BENDER: I agree with you, your Honor.

THE COURT: I find that venue is a jurisdictional questionfor the Court. I won't submit it to the jury. All right

11 MR. BENDER: Incidentally, your Honor, that venue question was recently decided by the Second Circuit in Solesio.

THE COURT: Did they say it's a jury question?

MR. BENDER: Not on the jury question, onthe question of venue would be wherever it was made and subscribed, prepared or filed.

I merely want --

THE COURT: I don't doubt that venue can be put in issue. I'm not disputing that. I'm only arguing with you about who has the right to decide it.

MR. BENDER: Yes. I know that, your Honor.

THE COURT: That's all.

MR. BENDER: Also,I think this issue of materiality -- I don't have to go into any objection on this because you say that you are ruling on it, as a matter of law.

THE COURT: What? On what, venue?

MR. BENDER: No, materiality.

MR. RYAN: 9 and 10.

THE COURT: Yes. On materiality. That's an issue for the Court. The issue of materiality.

MR. BENDER: I take exception.

THE COURT: Any objection to 8?

11 MR. BENDER: Yes, your Honor. 906

THE COURT: What's your objection?

MR. BENDER: Well, I think the kind of abortive definition of intent and I don't think -- I think it might -- I say this with all due respect, Mr.Ryan.

THE COURT: All right.

We will take a short recess.

(Recess taken.)

(The following occurred in the absence of the jury.)

THE COURT: All right.

Let's go over these requests, gentlemen.

I will not be here all day. Hoover v. U.S., 358, F. 2nd, 87, Fifth Circuit, 1966, page 89.

The trial court could have decided that the subject matter was material, as a matter of law.

MR. BENDER: That's 358 Fed. 2nd?

THE COURT: That's right.

MR. BENDER: Fifth Circuit?

THE COURT: That is right.

And in Vario, I did not charge that they had to find that the misstatement was material.

Now, I don't recall whether our Court of Appeals discussed it.

MR. BENDER: You mean, they may not have raised

13 it, your Honor? 907

THE COURT: I think they raised everything, but I don't know whether they discussed it. I'm sure it was in the brief.

Next.

MR. RYAN: We're on 8.

THE COURT: You don't agree on 8?

MR. BENDER: No.

THE COURT: Objection overruled.

Granted.

How about 9? I deny that. That's an argument you can make to the jury. We will go to the supplemental. Granted to the extend indicated.

11? Granted but I am not going to charge in that language. I'm going to charge that he's like every other witness. Granted.

12; granted.

MR. BENDER: Judge--

THE COURT: You have an objection to everything I grant.

MR. BENDER: No, no. I wanted to say this to you: I gave you a request on this but I didn't have time to give you a citation and my recollection is, U. S. v. Minieri, in the Second Circuit --

THE COURT: What are you talking about,

14 reputation of good character? 908

MR. BENDER: Yes.

THE COURT: I take it right out of the form book. Nobody says it better than --

MR. BENDER: Okay.

THE COURT: -- than Devitt & Blackman.

13.

MR. BENDER: Mr. Ryan got it from Mathis, he ought to give Judge Mathis.

THE COURT: It's been affirmed a thousand times. I've given it to you word for word.

13 is granted.

You have an exception to all my rulings, Mr. Bender.

MR. RYAN: 14, your Honor?

THE COURT: If you don't want to take chances, I will.

MR. RYAN: There was a 14, your Honor.

THE COURT: 14 is what?

MR. RYAN: In determining guilt of innocence of the defendant the jury should not give any consideration to the matter of punishment. That question is exclusively the responsibility --

THE COURT: That's true. I don't know whether I will -- it is granted but I don't know whether I will

15 charge it.

If the defendant makes a plea about the possibility of punishment, then I'll tell the jury it's none of their business. It's mine.

Request No. 1 is granted.

MR. RYAN: Your Honor, I think that the Government's No. 10 covers this charge.

THE COURT: Well, if I grant both, then there can be no argument.

MR. RYAN: But the language in which this is stated --

THE COURT: I don't intend using the language of either. I'll use my own. I take pride in authorship. I borrow and then claim it as my own.

MR. BENDER: I apologize for my mathematics and count -- request 2.

THE COURT: Apparently Count 1 is three pages. Not 2.

MR. BENDER: Yes.

(continued next page.)

S flys.

(The following continued to be heard in the absence of the jury.)

THE COURT: Of course I am going to say nothing about what you say on the third page. I will not carry the ball for you, Mr. Bender. Each lawyer does his own work and the judge won't help either. You go to the jury and argue this. I will make no argument. I will state the principle.

MR. BENDER: On request number two, Your Honor, that is $155,000, according to your mathematics.

THE COURT: $155,000.

MR. RYAN: Your Honor, the exact figure i $155,000 and some hundred dollars.

THE COURT: Why don't you stipulate that.

MR. RYAN: The stipulation is approximate.

THE COURT: All right.

MR. RYAN: I will be arguing $156,000.

THE COURT: I am not going to stop you.

MR. RYAN: All right, very well.

THE COURT: I will not charge the jury on any principle which indicates that if they make findings in accordance with one side's contention or the other, then they must find the defendant guilty or not guilty. " . . . if you accept this contention of the defendant . . . " as soon as I see a request

like that, it is denied. I will not do that. That again is nothing more than calling the jury's attention to the position of the defendant plus the imprimatur of the Court on it giving it credence. If the jury believes it, it is because of the test and nothing else. Denied.

MR. BENDER: The jury should be told, I think -- would you want me to say anything further about this or shall I stop?

THE COURT: No, go ahead.

MR. BENDER: I think this is the one request which sweeps all the counts. And the jury should be told that if the defendant had this intent, if the jury believes him, that he intended to take the checks for the reasons that he mentioned, and deposit them only to the corporation, and that he in good faith gave them back to the corporation as the corporation's funds, without any knowledge that they were being misentered, then they should acquit him because then the Government --

THE COURT: I won't say it. I'm going to say if the Government fails to prove criminal intent, to wit, that he knowingly and wilfully filed false and fraudulent returns with intent to evade a substantial

portion of the tax, then they must acquit him.

Now, that is saying what you said except eliminates summation by the defendant, because if I say what you want me to say then I should say -- now mind you, if it is not shown -- this is really placing the burden on the defendant which would be wrong, if he doesn't show that he kept this money intending to give it to the corporation, and that he didn't know that the money returned to the corporation was in a column called "advances" or "loans" then you must find the defendant guilty. Would you want me to do that?

MR. BENDER: Well, I think to the extent that you are required -- and I say this most respectfully -- in the sense that you are required to charge this jury of the defendant's contention in the case which is set forth in the first paragraph of the request, it may well be that when you give the request then the Government's contrary contention should be given too, but the point is if you don't give the defendant the very contention of his defense in the case it never comes from me with the same force and effect --

THE COURT: I [illegible] not say I would not give the position of the parties. That is a little different

than summarizing the evidence and pointing to the defendant's position and the evidence supporting it.

MR. BENDER: Well, that is all I thought the first two sentences of the request to charge --

THE COURT: Well, you listen to what I have to say in the charge and you take an exception to it. But I will tell you this, nothing that I say is going to indicate that the defendant took this money intending to hold it as corporate funds and that he knew nothing of the books of the corporation. I am not even going to say the defendant contends that is so because that is giving the jury the idea that I believe that that is so.

MR. BENDER: Absolutely not.

THE COURT: Absolutely not. That is why I won't give it.

Now, the next point, request number three.

MR. RYAN: Objection.

THE COURT: Oh, I will read all those cases. I will be most surprised if they are what you say.

MR. BENDER: You may be surprised.

THE COURT: Oh, yes, I am ready for surprises.

MR. BENDER: Why don't take it as subject, Your Honor?

THE COURT: Well, I will reserve decision on that. I will just put a big question mark on it. You don't have any citations for that, do you?

MR. BENDER: Your Honor, I apoligize to you --

THE COURT: Do you have a case like this? I know everyone blames his accountant but I didn't know that the Courts said all you do is shift liability to the accountant.

MR. BENDER: No, I think what you have previously stated with respect to the accountant should be -- this should fit in with that. There are any number of cases that you are familiar with which espoused this principle of law. There are some recent Second Circuit cases. I didn't have time to -- I'm not saying they say exactly the same. I'm taking it from them.

THE COURT: Denied in the form submitted.

" . . The defendant claims . . " Denied. You argue what the defendant claims.

MR. BENDER: How about the last sentence?

THE COURT: You have got a sentence there?

MR. BENDER: I think so.

THE COURT: I agree with it. But I am not going to state it. I am not going to put everything down

that you think is relevant to the case. Part of it is summation. Part of it is charge. And I am trying to separate the law from the arguments.

MR. BENDER: Thank you.

THE COURT: I will grant 4(b). But I don't know that I will charge it. I will make it clear that the defendant is responsible for only what he does.

4(c) is granted. That doesn't mean I will charge it. Again --

MR. BENDER: Do you mean in substance?

THE COURT: -- again, it all goes to criminal knowledge. What you want me to do is exclude every possibility of criminal knowledge. You are doing it in the negative. And I am saying that the Government must prove that this defendant committed these acts with criminal intent in the form I previously stated. And you want me to say a mere error is not knowledge. A mistake is not knowledge. An accountant's mistake is not knowledge. His accountant's errors are not knowledge, all of which are true. But you argue that to the jury.

4(d) is denied. I don't think it's true. It was necessary for the Government to prove defendant had knowledge of all the transactions charged

against him in this case?

MR. BENDER: Yes.

THE COURT: That is wrong on its face.

MR. BENDER: The transactions that the Government claims are the extras. I do not mean to be disrespectful. All of the transactions charged in the case.

THE COURT: If they don't prove all the transactions then they should acquit the defendant? Is that what you are really saying? You already disproved three transactions. You proved that George Cummings and Seidman were not transactions of Dotal but of Horn. A judgment of acquittal?

MR. BENDER: No. I will withdraw that. All right, I will withdraw for (d).

I notice I left out materiality.

THE COURT: Well, there you are. Isn't that something?

MR. BENDER: It shows how much I know.

THE COURT: It shows if the Government presents something you object to it but your own looks good.

No, you have got it in the last paragraph "by true and correct I mean accurate" but you don't show --

MP. BENDER: I know I put it in there.

THE COURT: No, that's a mistake. You made two mistakes.

MR. BENDER: Where?

THE COURT: When you left it out of your essential elements and then you discuss the definition of material, and I think it is confused with the 7201 violation.

MR. BENDER: I don't think, Your Honor -- I think you are right. I think the materiality -- well, I don't know -- I know that the law requires a substantial amount to be shown in order for it to be a false statement.

THE COURT: Mr. Bender, I would agree that materiality is an issue. But again it is an issue for the Court. That is the one rare case in which a fact issue is for the Court in a criminal case, materiality, and I don't think there is any question, because it is probably a mixed question of law and fact and it is something that the jury can't handle. So if it is going to be mishandled let it be mishandled by the Court.

MR. BENDER: Well, it's hard to set these down as a guide to the Court. I wasn't trying to give you --

THE COURT: Well, in general I approve 5. How does that follow? If you acquit on 1 and 2 you must acquit on 9 and 10?

MR. BENDER: Because the very income which the Government has charged the defendant as having wilfully evaded from Story Book Homes is included in counts 1 and 2, and if they determine that he did not wilfully attempt in any way to evade the extra income, then certainly he coudn't have wilfully made a false statement omitting the extra income.

THE COURT: Of course that is wrong because he could be acquitted on count 1 of attempting to evade the payment of taxes because, among other reasons, that the jury does not regard the said report of that income as substantial, unless you want me to charge the jury as a matter of law that if they find the income in 9 and 10 was falsely stated, and he received it, that it must be substantial.

MR. BENDER: I don't think there was any dispute on that, is there?

THE COURT: Well, if you dispute it -- if you don't know about the issue of venue, I don't think you want to concede substantiality in any event.

MR. BENDER: If you make that as a condition.

THE COURT: No, I am not trading with you, Mr. Bender. Just want to show you the weakness.

MR. BENDER: I am just trying to show there can't be a real serious issue on substantiality.

THE COURT: The point is the charges are entirely different. One is intended to evade the payment of a substantial amount of tax due, which is 7201, and the other is really perjury in not filing your tax return --

MR. BENDER: Judge, you have counts 9 and 10 --

THE COURT: Denied. I am not going to go into extended argument. I do not have the time. I hope to get out of here by 4:00. Once you have stated we are going over it because I have other things to do. This could be a very interesting discussion right into the night but I don't have the time for it.

I won't deny that for other reasons.

You are perfectly right in what you say. But I am not going to charge the jury that they need not worry about this criminal case because the defendant is ready to pay the taxes.

MR. BENDER: You don't have to say that --

THE COURT: I will very well charge them whethe he committed a crime or not depends upon what occurred

as of the date that he filed the return, and anything he does or intends to do in that regard has nothing to do with this case whatsoever.

MR. BENDER: Well, the only thing is that the jury should not be made to feel that in determining whether the man is innocent or guilty he might conceivably be getting away with taxes which admittedly here --

THE COURT: Well, Mr. Bender, I tell you now if you say to the jury in effect he is going to pay his taxes, which is probably uppermost in your mind and you are probably thinking of a way to get it to the jury, he is going to pay his taxes; he will even pay a penalty and interest, and a fraud penalty --

MR. BENDER: I don't intend to say that.

THE COURT: You don't? But if you do I am going to tell them that this case has nothing to do --

MR. BENDER: I don't intend to tell them that. But I think you should tell them.

THE COURT: No. I will not. It has nothing to do with the case.

MR. BENDER: I think you should tell them that this case has nothing to do with it and does not involve the collection of income taxes.

THE COURT: Oh, I might tell them about that in that form.

MR. BENDER: That is what I mean. That is a civil matter and has nothing to do with it.

THE COURT: In that form? That form I think is correct.

MR. RYAN: That's fine.

THE COURT: This is a criminal case and it had nothing to do with the Government's collection of taxes. It is something to do with a criminal violation the charge that he committed a crime. I think that is perfectly fair. I had the wrong impression, Mr. Bender.

MR. BENDER: I thought I put it in here, but sometimes the Supreme Court of the United States in the opinion as cited -- I have trouble with it --

THE COURT: What is the purpose of request number eight?

MR. BENDER: The purpose:

THE COURT: " .. The tax laws are so complex that many thousands of taxpayers innocently file tax returns containing errors . . "

MR. BENDER: Yes, there is no question that there is an error here. We have given the Government a

tremendous concession here.

I don't want the factor that he merely signed a return to reflect --

THE COURT: I will charge them if this were an inadvertent error done without his knowledge and that he did not intend to evade on the first eight counts, if he didn't intend to falsify the second two counts, he is not guilty.

MR. BENDER: But I would like to charge that the mere --

THE COURT: But to put him in the general population of people that commit any kind of an error -- do you mean for taking a deduction of $20 for charity when it was only $18?

MR. BENDER: I'll be very content if you want to excise that line. But the whole purpose of this is that the mere signing of the tax return is not -- they cannot draw an inference of wilfullness merely from that act.

THE COURT: Oh, no question about that. If you take that line out I think it is substantially correct.

MR. BENDER: I will take it out.

THE COURT: 9 is granted.

These form charges that you get, and I assume

you take them from the cases you cite justice smack of argument.

MR. BENDER: Just what?

THE COURT: They smack of argument rather than an instruction on the law. Now, you may even have taken it from the case. I don't know.

MR. BENDER: It is from the case but the only thing is that --

THE COURT: But the point is " .. you have been warned . . " I will just deny it. I will charge the jury as to how his testimony is to be weighted. And it will be the same way I charged in some five or six hundred cases where the defendant has taken the stand. There was nothing unusual about this. He is to be treated like any other witness.

MR. BENDER: But in view of Government's Exhibit 11 --

THE COURT: I am not going to charge, I said, in that language. I will not charge that he has a vital interest in the outcome. I will just tell them to use the same guidelines as I offered for the other witnesses.

11 is granted.

All right, both sides have exceptions to all my

rulings. So that you sleep nights, you won't have to wonder whether something slipped by.

Now, the witness you came about three hours late, can you come forward now, please.

MR. WOLFSONT: I have some documents here --

THE COURT: All right, show it to Mr. Ryan.

(Documents handed to Mr. Ryan.)

THE COURT: What company is it, incidentally?

MR. RYAN: U. S. Fidelity and Guarantee.

(The person who came forward thereupon indicated to the reporter the same to be Mr. Thomas A. Jacka.)

MR. JACKA: Insurance company.

MR. RYAN: You represent who, sir?

MR. JACKA: We are the agent for Story Book Homes.

THE COURT: Are you employed by the insurance company, or are you an adjuster?

MR. JACKA: No, I am employed by the Brady Insurance Agency. We are an independent agency.

THE COURT: You are not an independent adjuster.

MR. JACKA: I am not an adjuster, no.

THE COURT: An independent agency. Did you hire an adjuster?

MR. JACKA: No.

MR. RYAN: What was the date of the flood that you had something to do with?

MR. JACKA: The first one was February 7, 1971.

MR. RYAN: What was the date -- you say there was another flood?

MR. JACKA: There was another one which occurred on September 15, 1972.

MR. RYAN: September 16, 1972. Do you have any record as to what records were destroyed in the flood?

MR. JACKA: No.

MR. RYAN: What do you propose on his testimony?

MR. WOLFSONT: I was doing to propose a stipulation.

THE COURT: Mr. Bender, do you want to be in on this?

MR. BENDER: With your permission I will let Mr. Wolfsont who is most familiar with it handle it.

MR. WOLFSONT: If you stipulate I would propose that in February, 1971 there was a flood and thereafter a second flood, and the records of the defendant were stored there.

THE COURT: What records do you hold in your hand?

MR. RYAN: This is correspondence.

MR. JACKA: These are copies of correspondence indicating the date of the loss and that a flood did occur.

THE COURT: Correspondence with the insurance company?

MR. JACKA: Yes, between our office and the insurance company, and in both cases a claimant was a tenant in the building.

THE COURT: What do you intend to establish by that, that there was a flood?

MR. WOLFSONT: That there was a flood because he did testify that his records were stored there and he lost.

THE COURT: Is there any question about it?

MR. RYAN: It's a question of what records were in the flood.

THE COURT: Well, it is a question of how much of a flood and how high it was.

MR. RYAN: Surely.

THE COURT: Did you examine the premises?

MR. JACKA: Yes, the first one, yes, Your Honor.

MR. RYAN: That's 71. That's not the one in issue. It is the second one that is in issue.

MR. JACKA: '72 also.

THE COURT: You examined it?

MR. JACKA: Yes, sir.

THE COURT: Where was the flood, in the basement?

MR. JACKA: The flood was in the basement of the building.

THE COURT: What was it due to?

MR. JACKA: Rain. Storm water damage.

MR. RYAN: From a storm?

MR. JACKA: Yes. Heavy rains.

MR. RYAN: How high was the water off the basement floor?

MR. JACKA: In both cases between two and a half and three feet.

MR. RYAN: Did you examine whether there were any file cabinets down in the basement?

MR. JACKA: There were. But I don't know who they belonged to.

MR. RYAN: Did the tenant complain --

THE COURT: Let me say I do not want to give a pre-trial examination. If you want to bring this witness in I will re-open the defendant's case. I will let you put him on the stand unless you stipulate

what took you so long?

MR. JACKA: For what? To come in?

THE COURT: Yes.

MR. JACKA: I received word twenty minutes of two.

MR. BRADER: We had called him earlier but he didn't get word.

THE COURT: I was told you left your office for this court at 11:30. Did you come from Kings Park?

MR. JACKA: Yes, sir. I left the office at ten minutes of two.

MR. WOLFSONT: I might also say, Your Honor, I have the file here where I had defended the loss for a short time and then I turned it over to the insurance company. There was a claim of over $3,700 --

THE COURT: We were talking about when this witness was asked to come to court and nothing else.

MR. WOLFSONT: He was also alerted earlier in the week by my office? Isn't that right?

MR. JACKA: On Tuesday.

THE COURT: Well, if you have the witness here at ten o'clock Monday put him on the stand. Apparently there are questions the Government would like to ask him.

MR. WOLFSONT: We will just do it.

THE COURT: Do you want to bring him back Monday?

MR. BENDER: Let us decide, Your Honor.

THE COURT: All right, Monday at ten o'clock. I can say this --

MR. RYAN: I would like to make a request --

THE COURT: -- if the witness is not here promptly at ten o'clock he is not going on.

MR. BENDER: I will notify Mr. Ryan that we intend to call him. Will that be okay?

THE COURT: All right, gentlemen.

(Recess was thereupon taken to Monday, July 1st, 1974, at ten o'clock.)

* * *

rp

(The following occurred in the absence of of the Jury.)

THE COURT: Both sides ready?

MR. RYAN: Yes.

MR BENDER: Ready.

THE COURT: All right. What is it? You are moving to re-open the case.

MR. BENDER: We are moving to re-open the case, your Honor, in addition to the permission you granted us on Friday to put in the insurance individual, who will simply testify that there was this flood, that he -- there was a lawsuit and that he paid out on the flood, and secondly, with respect to the Government's strong assertions that Mr. Hornberger lied when he was interviewed on September 14, 1972, by Special Agent Mazzella, when he was shown various items or entries in the stockholders' advances, that monies came -- he borrowed moneis from his mother, with respect to that, there is a conflict.

Mr. Mazzella says that he referred -- Mr. Hornberger referred to all of the entries as coming from loans. Mr. Hornberger and Mr. Canale say that all that Mr. Hornberger said was, "Some money I borrowed from my mother."

You will recall in the opening statement,

Mr. Ryan said that that statement was a deliberate lie because of these monies were extras which were re-deposited and entered as stockholders' loans.

We have found over the weekend corporate checks in various amounts from December, 1970, to roughly July 16, 1971, antedating Special --

THE COURT: Excuse me. From whatn?

MR. BENDER: From December 21, 1970, to July 16, 1971. While this was after the Revenue Agent Gerimia had come in, it was almost a year and a half more -- from the time that the special agent came in, and that the special agent --

THE COURT: What is your objection, Mr. Ryan?

MR. RYAN: I object, number one, that don't say that a loan was made from the mother to the defendant. They don't establish the purpose.

THE COURT: Is that the argument against it?

MR. RYAN: Yes. They are insufficient.

And secondly --

MR. BENDER: I hand the checks to Mr. Ryan.

MR. RYAN: They are insufficient to support the offer because we don't know what -- the checks don't say anything.

MR. BENDER: Yes, they do.

MR. RYAN: I am looking at them. These were

not destroyed in the flood.

THE COURT: Let's assume --

MR. WOLFSONT: 1970.

MR. RYAN: I know.

THE COURT: Let's assume they don't say anything. I will not allow it in unless Mr. Hornberger takes the stand or somebody takes the stand and offers them as accounts payable and if the Jury believes that these were the very loans that Mr. Hornberger was talking about and that he repaid them, then it is a matter of credibility.

MR. BENDER: I agree, your Honor.

THE COURT: But it is clear that iw as after Mr. Gerimia came in.

MR. BENDER: Yes.

MR. RYAN: Yes.

THE COURT: And started looking at the books. But I am not going to pass on the credibility of the testimony.

MR. BENDER: We are content to do what your Honor --

THE COURT: Mr. Hornberger will have to resume the stand and say that.

MR. BENDER: Your Honor, could we -- we might be able to put Mr. Canale back because he would be able

to indicate whether the books and records of the corporation for the years 1970 and '71, do actually reflect repayments of loans which were cdebeted to the stockholders' advance account of Mr. Hornberger. I think he might be better able to do that but we would have no objection to letting Mr. Ryan put Mr. Hornberger on the stand and cross-examine him.

THE COURT: Well, Mr. Bender, if you want to get the checks in, then somebody who is able to say that these checks are made in the regular course of business will have to get on.

If you want to prove the entries in the books, then aren't they in the evidence now?

MR. BENDER: No, Judge. These are 1970, '71.

THE COURT: Whoever can testify as to the entries in the books.

Where is Mr. Canale?

MR. BENDER: He is here.

MR. WOLFSONT: For that reason.

THE COURT: Do it any way you want to. I'll just rule on the matters as they come about.

The motion to re-open the defendant's case is granted.

Seat the Jury.

MR. BENDER: Thank you, your Honor.

(Jury present.)

MR. BENDER: Your Honor, would it be all right for Mr. Wolfsont to handle the insurance man?

THE COURT: Surely.

MR. BENDER: Thank you.

THE COURT: Good morning, ladies and gentlemen. The defendant moved to re-open his case and I granted it. You may call your next witness.

MR. WOLFSONT: Thank you.

THOMAS A. JACKA, called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. WOLFSONT:

Q Mr. Jacka, what is your occupation?

A Insurance agent.

Q And do you maintain a place of business in Suffolk County?

A Yes.

Q And do you write insurance for Mr. Hornberger and the various building corporations?

A Yes.

Q And would you tell us what kind of insurance you write?

A Various kinds, fire insurance, liability, compensation.

Q Did you write a policy of insurance on a building owned by Horn Enterprises in Fort Salonga, New York?

A Yes.

Q Now, did there come a time when you were called to investigate or appraise a loss?

A Yes.

Q And will you state when that was?

A September of 1972.

Q And do you know whether or not you received a telephone call or a letter?

A We received a phone call and a letter, both.

Q And in response to that, did you then visit the Horn building in Fort Salonga?

A Yes, I did.

Q And about when was that?

A Two or three days after the reported loss, reported damage.

Q What was the date of that reported loss?

A September 16, 1972.

Q Now, when you got to the Horn office building, will you tell the Court what you found?

A There had been a sever water damage caused by

storm -- storm water and heavy rains.

Q Now, when you investigated the premises, did you investigate all of the basement area?

A Yes.

Q And is that the subject of the claim, basement area loss?

A Yes. It was damage in the property in the basement.

Q There were three parts to the basement? There was a tenant. Do you remember the name of the tenant?

A Tooley Construction Corporation.

Q And did Tooley Construction make the claim for the loss?

Q They made a claim against the owner of the building for their property damage.

Q And did you inspect the office building opposite the Tooley Construction area?

A Yes. Yes.

Q And did you inspect the balance of the basement?

A Yes, I did.

Q Would you tell the Court and Jury what you found?

A Well, there had been serious water damage throughout the basement because of rising waters and the

depth of the water was in some parts two feet, other part it might have been four feet, four and a half feet.

MR. WOLFSONT: That's all.

CROSS-EXAMINATION

BY MR. RYAN:

Q Do you havetthe weather report for September 12, 13, 14, 15?

A No.

Q Did you ever obtain it?

A No.

fols.

(Continued in next page.)

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CROSS- EXAMINATION

BY MR. WOLFSONT: (Cont.)

Q What damage did the tenant claim?

A Damage to their files, cabinets, rugs, furniture.

Q And in other words, about four feet water, up to four feet of water occurred as a result of rain?

A Yes.

Q Not a broken pipe?

A No, no.

Q Okay.

Now, I take it, Mr. Hornberger was there when you examined the basement?

A No, I was not there when I examined it.

Q Wasn't there.

Did he have a pump going, pump the water out?

A They did. When I got there, most of the water had been pumped out and it was cleaned up.

Q That's what it looked like when you first arrived?

A Yes.

Q So you don't really know whether it was two feet to four feet?

A Yes. There were water marks on the furniture and on the walls.

Jacka - cross

Q I see. This was as a result of one rain storm?

A A continuous rain storm and flooding.

Q For how long was the rain storm?

A I would say a good twelve, thirteen hours.

Q Now, did you take a statement from Mr. Hornberger?

A No.

Q You are insured concerning this loss?

A No. Because he was not himself making the claim.

Q Well, before you would pay out on a claim, wouldn't you take a statement from your insured to see whether or not he was responsible for any damage caused anyone?

A The insurance company made various examinations, took statements and the insurance company then paid the claim to Tooley Construction.

Q Do you have the insurance company papers?

A Yes.

Q With you?

A Yes.

Q Containing the statement of Mr. Hornberger, if he gave one?

A No, not from the insurance company.

Q Those would not be in your office?

A No. They would be with the insurance company.

Q And you don't have any insurance company papers with you?

A No. We have our own files. We are an agent we are not the insurance company.

Q In the normal practice, would an insurance company take a statement from its insured before it would pay out on any losses?

A Certainly.

Q And do you have any doubt that that procedure was involved in this case also?

A No, I do not.

Q And were you ever asked to get the insurance company files with the statements of Mr. Hornberger concerning this flood?

A No.

Q You were never asked to do that?

A No.

Q By anybody?

A No.

Q You, of course, have no idea whether Mr. Hornberger lost any records in this flood, do you?

A No, I do not know definitely.

MR. RYAN: Thank you.

No further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. WOLFSONT:

Q Mr. Jacka, under the insurance policies covering Hornberger, were personal records or corporate records insured?

A No. There would be no coverage for them.

Q Do you know whether the Government has ever asked you for these statements prior to this appearance?

A No, never.

MR. RYAN: What is the first time you were contacted about this case?

THE WITNESS: I think Monday of -- Monday or Tuesday of last week.

MR. RYAN: Who contacted you?

THE WITNESS: I received a call from Mr. Wolfsont.

MR. RYAN: Thank you.

No further questions.

MR. BENDER: Would you step down, please.

(Witness excused.)

MR. BENDER: Mr. Hornberger, would you take the stand?

THE COURT: You were previously sworn. You

5 Hornberger -

are still under oath. You understand that?

THE WITENSS: Yes.

MR.BENDER: May we have these 19 corporate checks, cancelled corporate checks --

THE COURT: Mark them as one exhibit.

THE CLERK: So marked as Defendant's Exhibit BB.

(So marked for identification.)

xxx MR. BENDER: With your Honor's permission, I am just bringing Mr. Hornberger back just to ask him one question about these checks.

(Continued next page)

6 Hornberger - direct

ELMER HORNBERGER, having been previously duly sworn by the Clerk of the Court, resumed the stand and testified further as follows:

DIRECT EXAMINATION

BY MR. BENDER:

Q Mr. Hornberger, I show you Defendant's BB for identification and if my count is correct, there should be 19 cancelled corporate checks there.

Would you look at them and please, if you can, identify them for the court and jury?

A These are checks drawn from Dotal Builders, Story Book Manor, Story Book Homes, payable to my mother, Edith Hornberger, returning the loan that I borrowed from her in 1967-68 period.

Q These -- do any of the checks reflect what they were issued for?

A Yes. Check No. 4011 says, "Repayment of loan of 1967-68."

Check No. 4871 says, "Repayment of Loan."

Check No. 4051 says, "Repayment of Loan."

The others just are written to my mother.

Q Was there any schedule that you followed with respect to these repayments?

A Yes. I had an obligation to my mother. I had borrowed the money from my mother. And I had a close relationship with my father when he passed away and consequently --

THE COURT: Strike it out as not responsive.

THE WITNESS: I'm sorry, your Honor.

Q Please, Mr. Hornberger.

A All right. I put myself on a schedule of -- like a one or two or three-week basis so that my bookkeeper would draw the checks payable to my mother, regardless if I couldn't pay anything else, I would be paying her first.

Q These checks were paid beginning when?

A The first one was in 1970. PUt them in order. December 21, 1970.

Q And when is the last one?

A Oh, God. I put them out of order. Could I just put them back in sequence?

THE COURT: You may ask a leading question, Mr. Bender.

Q Well, the last check I think is --

A July --

Q As I had told his Honor, July, but I think it's August 1971; isn't that right?

A Let me just find it, Mr. Bender.

Q Well, will you accept that? I have looked at them. Subject to your right to look and see if I am correct, but the last check would be August, 1971?

Would you accept my statement?

A Yes, yes. August 6th. It's right in front of me. August 6, 1971.

Q Now, your conference with Special Agent Mazzella, your first conference was September 14, 1972; is that right?

A Yes.

Q The last check here antedates that conference with over a year and two months or so; isn't that right?

A Yes.

Q Were these checks issued by you in the regular course of business?

A They were written by my bookkeeper and I signed them in the regular --

Q Corporate checks?

A Corporate checks.

Q Were these checks kept in the regular bank statements of the corporations after they were returned?

A Oh, yes.

MR. BENDER: I'm going to offer them in

9 Hornberger - direct

evidence.

THE COURT: Any objection, Mr. Ryan?

MR. RYAN: No.

I'll cross-examine.

THE COURT: Let them be marked.

THE CLERK: Defendant's Exhibit BB previously marked for identification are now marked in evidence.

(So marked.)

BY MR. BENDER:

Q By the way, do you know the total of these checks, roughly?

A I think sixteen/five.

Q 16,500?

A Yes.

MR. BENDER: All right.

(continued next page.)

Reel 3 flws.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. RYAN:

Q Where did you get the book?

A From our corporate records over the weekend.

Q Where are they kept?

A In my office.

Q Where in your office?

A In a file cabinet.

Q Where is the file cabinet located?

A In my comptroller's office.

Q Where did youkeep the records in 1970?

A In the same place.

Q Where in the office?

A In the filing cabinet.

Q Where was the filing cabinet located?

A In my comptroller's office.

THE COURT: In what part of the building, first floor, basement, second floor?

THE WITNESS: Oh, I'm sorry. First floor, your Honor.

Q Not in the basement?

A Not after the last flood, no.

Q These checks were written out before the flood;

weren't they?

MR. BENDER: Excuse me. I didn't hear the question.

THE COURT: Mr. Rudolph.

(Record read.)

A (Continuing.) Yes.

Q And where did you keep them after you wrote them out?

A These?

Q Yes.

A In my office.

Q Where in your office?

A In my comptroller's office, in the filing cabinet in the rear, where he has his office.

Q Who is your comptroller?

A Mr. Elvez.

Q What records did he keep in that drawer of the filing cabinet?

A He keeps all the records that --

Q Check stubs?

A Yes.

Q Cancelled checks?

A YEs.

Q Bank statements?

A Yes.

Q When he wrote these checks out in '70 and '71, they came back in envelopes from the bank; correct?

A Yes.

Q Monthly statements, with cancelled checks; right?

A Yes.

Q And they were placed in his file cabinet on the first floor of the office; is that right?

A We only have one floor, yes.

Q You have a basement; don't you?

A Not in the office I'm in now.

Q The office where the -- what office were you in when these checks were written?

A In the office that I'm in now.

THE COURT: Give the address, please.

THE WITNESS: Oh. 100 Smithtown Bypass, Nesconset.

Q All right.

A That's where my models are.

Q You weren't in the Fort Salonga office when these '70 and '71 checks were written out; is that it?

A No, because I never used that as an office.

Q You never used the Fort Salonga office?

A Not as an office.

Q You used it for something else, I take it?

A For storing records.

Q Did you store these records in the Fort Salonga office?

A No.

Q Is there any reason why you stored these '67 and '68 but not the '70-'71?

A Yes. May I explain it?

THE COURT: Just answer the question.

THE WITNESS: Yes.

Q There is a reason?

A Yes. Mr. Gerimia made a complete examination of our books in 1967 and 1968, and hetold me to put these records aside because we were under investigation. So naturally I did not want to mix them with anything else that was in my office, and certainly if I'm under investigation on '67 and '68, I don't want my office people to know that the Internal Revenue is investigating me.

So I put the records so that they could be put in one place, found very quickly, and in five minutes anything could be pulled out.

Q Then you had the flood?

A Yes sir.

Q September 16, 1972; correct?

A Yes.

Q Did you ever tell Mr. Gerimia or any Internal Revenue Agent that the records that you wanted were destroyed in the flood?

A They didn't ask me. Mr. Gerimia didn't ask me that.

Q Did you preserve any of the records to show that they were damaged by water?

A I didn't feel -- they were un -- they just were not -- there was nothing left. There was 4 foot of water.

Q Did you look -- well, there was still a check stub; wasn't there?

A You couldn't -- if you put -- if you put water on ink, you can't read it any more. The papers were demolished. Nothing left.

Q Did you preserve that checkbook that you couldn't read it any more so anyone could see it to say it couldn't be read?

A Mr. Ryan, if I knew that now, I wish I had the checkbook.

Q What did you do with the checkbook?

A Everything was thrown out in the large container which the garbage disposal takes away.

Q Under your supervision?

A Yes.

Q All right. Now, of course at the time these checks were written out, Mr. Gerimia had already gone to Mr. Canale's office; correct?

A I think Mr. Gerimia had already been at my office.

Q And you knew that there was an Internal Revenue Service investigation under way; correct?

A Mr. Gerimia led me to believe, as he-- his testimony --

THE COURT: No. Will you please just try to answer the question?

THE WITNESS: Yes, yes. I'm sorry, your Honor. I apologize.

Q And the -- what did your mother do with the money?

MR. BENDER: I object to that, your Honor.

Q Do you know?

THE COURT: Well, I will allow it.

THE WITNESS: No, your Honor.

THE COURT: I will allew it, if he knows.

THE WITNESS: May I answer it with a question?

THE COURT: If you cannot answer it, say you

cannot answer it.

THE WITNESS: What is it? Is it objection?

MR. BENDER: I just want the witness to be advised that when there is a ruling to be made by the Court, he should not answer any questions, until the Court rules.

THE COURT: Objection has been overruled.

Mr. Rudolph, would you please give the witness the question.

(Record read.)

A (Continuing.) Yes, she deposited it in the bank.

Q What was the name of the account?

A Bank of -- in Bank of Riverhead, Riverhead Savings Bank.

Q What name was the account?

A My mother placed the money in trust for my four children and -- I don't think all of it but some of it in trust for the four children.

MR. RYAN: No further questions.

REDIRECT EXAMINATION

BY MR. BENDER:

Q So that we don't -- withdraw that.

May I have that, please?

8 Hornberger-redirect

MR. RYAN: It's right there.

Q These checks relate to 1970 and 1971; do they not?

A Yes.

Q They don't relate to the 1967 and 1968 records; isn't that right?

A No.

Q And all your 1970 and 1971 records were intact? Were they not? At the time Mr. Gerimia came in?

A Yes.

Q With respect to Mr. Gerimia, he had access to all of your corporate records, including the ones that had later been lost in the flood; did he not?

A Yes.

Q He had the job files?

A Yes.

Q He had the checkbook stubs?

A Yes.

Q He had your cancelled checks?

A Yes.

Q He had the -- all of the correspondence?

A Yes.

Q And he had these large corporate books which were in Mr. Canale's possession?

A Yes.

Q Which are in evidence in this case; isn't that right?

A Yes.

Q How old is your mother?

A My mother is 72 years old.

MR. BENDER: I have no further questions.

RECROSS-EXAMINATION

BY MR. RYAN:

Q Were the job files destroyed, too? In the flood?

A Job -- everything that Mr. Gerimia went through was destroyed in the flood.

Q Was the job files destroyed in the flood?

A Yes, Mr. Ryan.

Q Under your supervision?

THE COURT: Objection sustained.

A Under my supervision? Please.

Q Were the job files thrown out after the flood under your supervision?

A What was left of them, yes.

Q There were some that were not destroyed?

A Nothing was -- could be read.

MR. RYAN: No further questions.

10 Hornberger=

MR. BENDER: Would you please step down?

May we just call Mr. Canale for one or two questions.

THE COURT: Yes.

MR. BENDER: Mr. Canale, would you take the stand, please?

T H O M A S J . C A N A L E , having been previously duly sworn by the Clerk of the Court, resumed the witness stand and testified further as follows:

THE COURT: You have been previously sworn, Mr. Canale. You may resume the stand. You are still under oath.

THE WITNESS: Yes.

DIRECT EXAMINATION

BY MR. BENDER:

Q Mr. Canale, in 1970 and 1971, you were still the accountant for Mr. Hornberger's corporations?

A That's right.

Q In those years did you make a bank reconciliation of the corporate checks in the bank statements?

A Yes. My girl. I didn't physically do it.

Q Were you aware of it?

A Yes, sure.

Q And did you attempt to make the same allocation

with respect to checks that were issued that you testified before as to 1967 and 1968?

A Yes.

Q Now I show you 19 checks, BB in evidence. To your knowledge, in your reconciliation of the bank statements -- and I say to your knowledge, I mean recognizing that Miss Paterno made it, but if you have any recollection of your own -- were these checks examined at the time of the reconciliation?

A Yes.

Q What entries were made in the corporate books for 1970 and 1971 with respect to the checks that were issued before you?

A These were charged to various accounts called Edith Hornberger or reimbursement of Edith Hornberger, which accounts were eventually closed into stockholder advance accounts.

Q What was the effect on the stockholder's advance account of Mr. Hornberger as a result of the issuance of these checks?

A To reduce the balance in said account.

Q So that while the checks were paid for by the corporation -- withdraw that.

While the checks were issues for the corporation,

who actually paid for the moneys given to Mrs. Hornberger?

A The corporation does.

Q But by --

A The books reflect that they were charged to stockholder advance, so in effect it's a repayment by the stockholder. The stockholder.

Q To the extent that there were credits in the stockholder's advance account?

A Charged to the stockholder's account.

(Continued on next page.)

HS

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HS-BB
M-1

Q Which represented amounts of money due Mr. Horberger, those credits were reduced by the amount of these checks?

A That's right.

Q In effect he paid for them; is that right?

A Yes.

CROSS EXAMINATION

BY MR. RYAN:

Q The books reflect, do they not -- these represented returns of funds to Mr. Hornberger?

A That's correct.

Q For his personal purposes?

A Yes.

Q During your representation of Mr. Hornberger, did he ever ask you what he should do when records were destroyed in a flood that the IRS was looking at?

A I don't recall that he did.

Q If he did would you recall?

A If he did, would I recall?

Q Yes.

A I don't know -- if the records were destroyed, I don't know. I don't know from my personal knowledge that they were destroyed.

Q You represented him at some stage during the

Internal Revenue investigation?

A Yes.

Q Did he ever tell you that there was a flood in the basement and that check stubs and the job files are unreadable -- did he ever tell you that?

A He probably told me that --

THE COURT: When you say "probably" do you have a recollection that he did?

THE WITNESS: He must have said that.

Q Why do you say "must have?"

A Because I don't remember him in an actual conversation saying to me the records were destroyed.

However, when he mentioned it -- if he mentioned it to me -- it wasn't too important because Mr. Jeremiah saw it --

MR. RYAN: Objection.

THE COURT: Strike it out, not responsive.

Q Just tell us what, if anything, Mr. Hornberger told you about the flood and the records.

A That the records had been destroyed that Mr. Jeremiah had seen.

Q Did he tell you right up at the time of the flood?

A I don't think so.

Canale-cross

Q Did he call you up -- how long after the flood, did you learn about it?

A I can't say that.

Q Was it a week, a month, two months?

A I don't remember. It might have been a week or a month -- might have been any of those dates.

Q Mr. Canale, this flood according to the defendant produced here by the defense, occurred on or about September 16, 1972.

You represented Mr. Hornberger in this matter then, didn't you?

A Yes.

Q You were his lawyer, weren't you?

A Yes.

Q Did he call you up and say, "I had a flood and the records that the IRS wanted were destroyed?"

A I used to see him every so often so --

Q Yes or no, did he call you up and seek your advice as to what he should do with those records that were allegedly destroyed in the flood?

A No.

Q He told you that after, that they were destroyed?

A I used to see him quite often --

Q No.

Canale-cross

Are you absolutely certain that he didn't call you up to find out what he should do with these records?

A Yes, I am certain.

MR. RYAN: No further questions.

REDIRECT EXAMINATION

BY MR. BENDER:

Q Mr. Canale, you were present at the conference on October 10, 1972 between Mr. Hornberger, yourself, Special Agent George Mazzella and J. Michael Daley. Do y ou remember that?

A Where was that?

Q The place was Story Book H omes, Smithtown bypass.

Do you have a recollection of that?

A Yes, I do.

Q Do you recall at that conference whether anything was said at that time about the flood in the basement which may have destroyed many of the job files, sales contracts, closing statements and bank deposit receipts?

A I don't recall that specifically.

Q I show you a special agent's memorandum, marked O for identification, and I ask you to look at page 3 -- I ask you if that doesn't refresh your recollection?

(Document shown to witness.)

Doesn't that refresh your recollection that Special Agent Mazzella asked you and Mr. HOrnberger for the sales contracts, closing statements, and bank deposit receipts for 1967 and 1968?

A It says here, but I still don't remember specifically discussing it -- I don't -- you know, this is going back a good two years and I don't recall the conversation.

Apparently, we had this conversation becuase he wrote it up this way.

Q Do you recall whether or not Mr. Hornberger indicated that these documents had been lost in a flood?

A I have to answer the same way as the last questions. I don't really recall.

MR. BENDER: I am going to offer this one into evidence, your Honor.

MR. RYAN: No objection.

MR. BENDER: While we are having this marked --

THE CLERK: Paragraph from Defendant's Exhibit O marked Defendant's Exhibit O-1 in evidence.

MR. BENDER: There has been no objection.

I sort of mutilated it. I am sorry.

THE COURT: Suppose you read into the record what is being marked.

MR. BENDER: "Mazzella requested the '67 and

'68 sales contracts, closing statements, job files and bank deposit receipts. The taxpayer said he did not know if he could find them as they were stored in the basement of his building and may have been lost during the flood in '71. The building being 103 Fort Salonga Road, which is on the corner Callahan's Path, Fort Salonga."

(Continued on next page.)

Q With respect to these repayments of the loans to Mr. Hornberger's mother, did you maintain any kind of a record in the corporate records for '70 and '71 reflecting loans payable to Mrs. Hornberger?

A Not loans payable, but these various payments were charged to the accounts called either "Edith Hornberger" or "Mrs. Hornberger" or something of that nature and eventually were closed out to the stockholder's advance account .

Q Do you have those with you?

A I have the records, yes.

Q Why don't you bring them out.

I just want to mark it for identification. I am not going to mark it into evidence. We will have it available if Mr. Ryan wants to see it.

A On Story Book Manor, 5,000 was charged from Edith Hornberger --

Q Before you read that, could we deem it marked or how shall we handle it?

MR. RYAN: I would like to have it marked?

MR. BENDER: You want it marked?

MR. RYAN: Yes.

MR. BENDER: The whole ledger?

MR. RYAN: Yes.

THE WITNESS: Part of it is --

MR. BENDER: Which is which --

THE COURT: He only offered one page.

THE WITNESS: There are three pages here.

THE COURT: The three pages are marked.

THE CLERK: Three pages marked as defendant's exhibit CC for identification.

THE WITNESS: Did I say Dotal?

Q Did you say Dotal?

A Dotal that is.

THE COURT: The first three pages?

MR. BENDER: Yes, your Honor.

THE WITNESS: I put them in the first three so I can find them.

THE COURT: All right.

Q I show you CC for identification.

Firstly, would you identify the ledger?

A The ledger -- part of the ledger of Dotal for the year 1971.

Q What are the additional loose leaf sheets which you have alongside?

A These are the cash disbursement books which I checked out for '71.

I checked these checks that you exhibited to me

before.

Q What are those three sheets that you identified as CC for identification?

A These are the account sheets -- the general ledger account.

We have an account called "Edith Hornberger" and had a charge of $5,000 to that.

We had another aecount "Reimburse Edith Hornberger $1,500" and another account called "Mrs. E. Hornberger $1,000."

In other words, $7,500 -- $7,500 in effect was charged to Mrs. Hornberger. These were eventually closed out to the stockholder advance.

Q That is one corporation?

A Yes.

Q And the $16,500 was issued through whatever corporation issued the check for the repayment of the loan?

A Yes.

Q Was that done the same way with all the other corporations?

A Yes.

MR. BENDER: No further questions.

(Continued on next page.)

RECROSS-EXAMINATION

BY MR. RYAN:

Q I am looking for the statment Mr. Bender read from.

Let me show you O-1.

With respect to the flood,is that statement your best recollection of what Mr. Hornberger told Mr. Mazzella on October 10th, 1972?

A- Yes.

Q Does it say -- in that interview of October 10th, 1972 which would have been a month after the date of the flood -- that Mr. Hornberger referred to December 16th, correct?

A Yes, if that's the date of the flood.

Q What date did Mr. Hornberger give forthe flood in that interview of October 10th, 1972?

A I don't know. It says here flood of '71. I don't recall what date he gave.

MR. RYAN: No further questions.

MR. BENDER: No further questions.

THE COURT: You may step down.

MR. BENDER: Thank you, Mr. Canale. The defendant rests.

MR. RYAN: The government calls Mr. Mazzella.

THE COURT: You understand that you have been previously sworn and you are still under oath.

THE WITNESS: Yes.

G E O R G E M A Z Z E L L A , having been previously duly sworn by the Clerk of the Court, resumes the witness stand and testifies further as follows:

DIRECT EXAMINATION

BY MR. RYAN:

Q With respect to the October 10th, 1972 interview and the conversation as reflected in exhibit O-1, can you tell us what your best recollection of what Mr. Hornberger told you concerning the flood?

A I had asked him for the records as previously mentioned and he said to me that they were lost in a flood which occurred during 1972.

MR. RYAN: No further questions.

THE COURT: Any questions, Mr. Bender?

CROSS-EXAMINATION

BY MR. BENDER:

Q Mr. Mazzella, did you make any attempt whatever to verify whether the flood occurred?

A No, sir.

MR. BENDER: No further questions.

THE COURT: Anything further?

MR. RYAN: No.

Thank you.

THE COURT: You may step down.

MR. BENDER: The defendant rests.

MR. RYAN: The government rests.

THE COURT: The jury may be excused for a few moments.

(Jury leaves Courtroom.)

THE COURT: Any motions?

MR. BENDER: Yes.

THE COURT: You renew all the other motions that you made. Same motions having been considered made, same rulings.

Ready for summations, Mr. Bender?

MR. BENDER: I am.

May I have a moment, your Honor?

THE COURT: Yes.

Mr. Bender, before you go, I looked over the question of materiality. The only case I could find was the Hoover case. I found another case by Judge Will that discussed what materiality was and it held as a matter of law -- or denied a motion to dismiss the indictment -- and held that it was material. That may be the second authority.

There he based the definition of materiality

on a District of Columbia case. I am sorry I do not have the case at hand. I am convinced in my own mind that materiality is a question of law for the Court.

If the defendant insists that I should charge that materiality is before the jury, I may very well do it.

You do not ask for it strangely enough in your request to charge --

MR. BENDER: Yes, I do. I thought I did and then you pointed it out --

THE COURT: In your essential elements you do not have it.

MR. BENDER: May I say this to you:

I thought I made it clear to you yesterday. I want to make it clear to you right now. I concede the materiality of the alleged false statements in Counts 9 and 10. I am trying to avoid your being troubled about it, because frankly we are raising no contention about it. I think that it is a material false statement if a man understates his income on a corporate return.

THE COURT: Frankly, I am not troubled in the sense that I have any question about it. I am troubled only because I like to avoid possible

error.

If I am convinced it is so, I would just as soon charge it.

The only cases I found was the Hoover case and if I read Judge Wills' case correctly and that's a District Court case in 1966 on the question. That seems to say the same thing, but not exactly. I found no case to the contrary.

MR. BENDER: The only reason I wanted you to charge the jury is that I myself do not want to be criticized for waiving or consenting as a matter of law, what I think is an issue of fact for the jury.

The jury only has to be told that there is no dispute about the materiality.

If you do tell them, there will be no problem.

THE COURT: Fine.

MR. BENDER: Thank you.

(Jury present.)

MR. BENDER: May it please this Honorable Court, Mr. Ryan, Mr. Wolfsont, Mr. Hornberger and ladies and gentlemen of the jury:

It is my function at this point -- not to be out of character -- to try and give you a kind of

summary of the evidence in the case or the lack of evidence in the case and what I can suggest that you could find from the evidence and the lack of the evidence.

I represent Elmer Hornberger, he is charged with the commission of a felony. This is a serious offense and anyone who willfully attempts to evade and defeat his taxes, deserves to be convicted of a felony.

I do not hold and do not maintain any belief that the nature of this offense is too harsh or anything. The tax laws require that people pay their taxes, pay them properly and don't cheat the government with respect to it.

On the other hand, we have a kind of double system. We have a system which permits the Internal Revenue Service to collect taxes civilly and that is not this proceeding, because regardless of what your verdict is going to be in this case, MR. Hornberger is going to have to pay taxes. There isn't any question about it. We have stipulated in this case right at the opening that some $156,000 were paid in extras. We couldn't stipulate that the whole $156,000 was omitted from

the corporate tax returns, because I think you now see from what the evidence in this record has revealed that the corporate books reflected on some of these purchases thousands of dollars more than the purchaser actually paid.

Then you heard Mr. Mazzella say in some instances they reflected less -- I think he said 29 -- so that you just don't know how much each corporation really did or did not omit.

But there isn't any doubt that he is going to have to pay taxes and he should and he will. There isn't any doubt also that Mr. Hornberger is not blameless -- far from it. He is just as responsible for the fact that there was a mix-up with the books and records and would prefer to properly pick up the extras as anybody else. This is not a question where Mr. Hornberger says "I blame Vicky, I blame Charlotte, I blame Rita, I blame Sophie, I blame Tom, I blame Trudy." No. There is no question here of blaming anyone and I want you to realize that.

During this entire case the strangest thing happened, Vicky said "I assumed Mr. Canale was picking up the extras."

Charlotte Waugh, "I assumed Mr. Canale was picking up the extras."

Mr. Canale, "I assumed the extras were being included into the contract prices given to me."

Nobody has said that this man -- this busy man was the one they assumed would take care to see that the extras are picked up and strangly enough even Mr. Mazzella -- as I will tell you later in his testimony -- admitted the same thing. I actually asked Mr. Mazzella when we were discussing all the overs and unders: "Mr. Hornberger did it? I wouldn't venture an opinion on that," he said. He did concede that it was the responsibility, however, of Mr. Canale and Miss Paterno.

Now, please remember the distinction between blaming someone and finding someone responsible for error. All of us make errors and in a busy office like this, the girls made errors. There isn't any doubt about it. Charlotte Waugh made an error in destroying the index cards. Nobody told her, but she destroyed them.

"Did Mr. Hornberger tell you? No."

"Why did you get the contracts?"

She couldn't recall.

This is another problem about the government's case in this case: Both Vicky, Charlotte and Mr. Canale -- somebody said they couldn't report events that took place 7 and 8 years ago. One of the most important conversations occurred when Vicky Coletti was asked "What conversation did you have with Mr. Hornberger when he gave you on the first occasion the check or checks from his personal account to be deposited into the corporate account?"

She said, "I don't recall."

I will read that to you. I am just speaking generally. There were mistakes that occurred and there were mistakes -- so many mistakes, bookkeeping errors, lack of communication between employee and employer, employee and CPA, and an unquestionable admission by Mr. Hornberger on September 14, 1972 "I told the buyers to give me the checks personally and I deposited them into my personal account."

Mr. Mazzella admitted it. It is in his memorandum.

(Continued next page.)

GR

1 R-BB M-1

MR. BENDER: (Continuing) So why? Why here? Why indict him? Why charge him with a felony conviction?

Why not accept the situation as it existed?

Look at the investigation they did. And say, "Set up the tax, pay the tax and whatever negligence penalties or whatever you want," look what the Government goes through, in bringing this man to this trial, just for the purpose of convicting him of a criminal felony without regard to the fact that in a totally different proceeding later they're going to go after him and collect taxes.

Well, the Government says, "We did it because Mr. Hornberger concealed the fact that he owed the extra money. He concealed it from the girls in the office. He concealed it from the agent."

In the opening statement Mr. Ryan said, "Mr. Hornberger was a resourceful man. He was the man who directed the bookkeeper. He directed the secretaries what to do."

And I'm not quoting. "All of the payments for the basic price, the model price, were made pursuant to the contracts to Mr. H's, Hornberger's corporations but the extras were a different matter. Then we will

show you," said Mr. Ryan, "further that the girls in the office and his accountant who would prepare his tax returns knew nothing about the $156,000.00 in extras. None of the girls," says Mr. Ryan, "knew about it."

"We also prove that when the IRS commenced its investigation, Hornberger knowing full well that he had received $156,000.00 as income on extras, attempted to cover up what he had done when asked about this money by the special agent. He deliberately lied."

If there is anything that ever came out in this case from the special agent's own lips, the first time Mr. Hornberger was asked during the investigation about anything, Mr. Hornberger, "I directed all the buyers to pay the extras to me and I deposited them in my personal account."

It's undisputed. Did he conceal it from the special agent?

You know there was some by-play about whether Mr. Hornberger volunteered it or whether Mr. Mazzella brought it to his attention. I'll come to that, but it didn't make any difference whether it was volunteered or it wasn't.

The fact is, he didn't cover it up. He didn't

conceal it.

This is a strange concoction of personalities which the Government wishes to conjure for your benefit. One, that Mr. Hornberger was -- was so shrewd and he had to have that malicious evil mind to cheat on his taxes, so that he could take the checks, put them in his bank account, nobody should know about it. This is what the Government says was what he did. He concealed it. He engaged in conduct to make certain that the Government could not discover the fact that he stole the extra money.

Well, when you thi nk of the character Jekyll and Hyde, you do realize that there are split personalities, where a man or a woman can be a -- in that case a physician of eminence, and yet in the evening, when the dogs howled and the moon came out, he could maraud through the streets and kill people and drink their blood, but was Mr. Hornberger this kind of a person, says the Government?

One hundred seventy-six pieces of documents, 176 pieces which have been marked in evidence in this case, and which were all over the office, the bank records, the contracts and some of the closing statements, all reflect that Mr. Hornberger was personally

taking the extras.

Now, Mr. IRS, if you want to contend that Mr. Hornberger is so shrewd and he's so clever, how could he be so stupid at the same time? Either he is a man with a devious, conniving, conspiratorial type of mind, and he conceals all these things, he says to his office -- doesn't tell his girls, doesn't even let them know he's getting the checks or he's stupid.

My God, ladies and gentlemen, even Mr. Hornberger can't be that stupid. Look at the system that was set up. All the girls in the office knew, beginning in 1967, that henceforth all extra checks shall be made payable to Mr. Hornberger.

Correspondence went out, "Please send the checks to Mr. Hornberger." There were even fights when the checks were made out to the corporation. Get the check back, give it to me.

Job files were made up which contained all the correspondence which was sent out to the buyers.

Then when payments were received, letters went out acknowledging the receipt.

Now, don't be misled who opened the mail. There is conflict in the testimony between Mr. Hornberger and the three girls, and don't be misled as to who made

the deposits and don't be misled about little things like that because the ultimate thing is, that regardless of who opened the mail, regardless of who made the deposits, there wasn't anybody in that office that didn't know and have something to do with the collection of extras from the buyers.

Ninety-three buyers in this case, according to the Government, were all Government informers who could at any time send a letter to the IRS and say that s.o.b. builder, that louse, he had me make out the checks payable to him instead of the corporation and, as you know, Mr. Greshin, one of those guys, actually did. So he couldn't -- could he be so stupid?

(Continued on next page.)

MR. BENDER: If he was intending to steal it, would he give 93 buyers a hold on him? The Government wants it one way. They can't recognize the inconsistency in their whole presentation with this man Hornberger.

Let's go on. Contracts of sale: Mr. Mazzella examined five or six. What an investigation. We put in over 60. Mr. Hornberger said that of the 92, he thought the substantial majority, all of them, had the extras attached to the contract.

Did he want to conceal it from the purchaser? Puts it inthe contract. We know there were closing statements, including the one in which Mr. Greshim, the informer testified, where the actual payment was made to Mr. Hornberger for the extras.

The Bank representative was there, the bank attorney was there. The buyer, the buyer's attorney, Mr. Wolfsont, Mr. Hornberger. Indeed, Mr. Greshim says,"I asked them, how, why, why to Mr. Hornberger nad not to the corporations? I was puzzled,"he said.

Was his mind generating at that time that he might be able to make some dough? Was he thinking of how I could get a reward on this thing? So he asks Mr. Wolfsont. Mr. Wolfsont says --don't say anything, but Wolfsont said,"It's okay. Don't

worry about it. Pay it to him." He asked Mr. Hornberger, they are not talking.

Well, obviously Mr. Hornberger is not going to tell him the reason why he wants it payable to him. If there is every a fight between his client and Mr. Hornberger, he is going -- not want Mr. Greshim of all people to know why he was taking the check in his own name. But Mr. Greshim seemd to indicate that there was something radically wrong with that procedure. I was puzzled.

He said, "And so what did I do? I sent a letter to the IRS telling them, you got a thief in your midst. I want a reward."

You know, unfortunately, he's going to get one. At least up to ten percent, because there isn't any doubt, from what we hear,that he sparked this investigation, and there isn't any doubt that we owe taxes. But I am only interested in the fact that he thought that there was something wrong. in doing this. In doing this.

And you remember his own client, John Walsh, we had Walsh -- we had Rizzi, we had Kmetz, and we had Campbell. The Government put on four buyers. In three of the four buyers, all the contracts

contained the extras. You remember Mr. Greshim actually made out the whole list on the bottom of his contract, in his own handwriting. But Greshim said, and incidentally on Walsh, it was Mr. Font, the salesman, he said, who made the deal with him onthe extras, not Mr. Hornberger.

But what Greshim said was that he was puzzled and then Rizzi, you remember Rizzi, Rizzi was the one who ordered the extras at the contract and he was told, he was told that he'd have to make a check out payable to Mr. Hornberger, and he disregarded that.

He issued a $1500 check to the corporation. And the he apologized. But when did he apologize? He said at page 80:"When I received -- when I finished with the conversation with Mr. Hornberger, I immediately stopped payment on the check and I notified my lawyer. And he said it was perfectly all right to make it out to him. So when I received it back, I went back and I made out the entire amount for $2100 to Mr. Hornberger."

So Mr. Rizzi's lawyer didn't think that there was anything wrong with making the check out payabel to Mr. Hornberger. And not to the corporation. Mr. Greshim, however, was puzzled. And I say to you that

no matter how wrong you may thing Mr. Hornberger was,because there isn't any doubt that by depositing the checks to his personal accounts, this whole thing got screwed up, since Mr. Canale, God knows why, only prepared the corporate records and the returns from deposits in the bank and I'll come to that.

Now, here is this man with all these traces with respect to the extras. Here is a man who takes the extra checks and deposits it to his own personal accounts in the same banks where the corporation had bank accounts.

Now, if you were a Revenue agent, like Mr. Gerimia, and even though you were not even a special agent, with the training that Mr. Mazzella has, would ittake so much brains, when you are in the bank looking at the bank records for the corporation, to ask if there are any individual accounts? Is Mr. Hornberger again so shrewd and yet so stupid, to put it in the same bank, if he wanted to conceal it?

And then why give it back? Oh, says, Mr. Ryan,-- in anticipation, I say, "He put it back because the corporations needed the money. They were broke. They needed money. Sure, they have property, building. That's the only reason why he put it back. Some crook. He'd have buried it so you might have a hard time

finding it. He had access to bank loans. I put a bank man on the stand.He was assistant vice-president of the Chemical Bank. I put him on for only one reason. Because I anticipated this argument.

You see, this is the kind of a case where the Government tries to make it from hindsight.

MR. RYAN: Objection.

THE COURT: May I have the last few sentences?

(Record read.)

THE COURT: You'd better give me a few sentences before that.

MR. RYAN: I'll withdraw the objection.

THE COURT: All right. Go ahead, Mr. Bender.

MR. BENDER: (Continuing) Here we have a man who admits, he left out extras. He admits that there was a foulup. He thought it was being reported.

Now, we got to decide whether he's a criminal and that he did it with a criminal intent. So let's look at the things he did and let's try to bring them out in such a way that it will be clear that he was a crook.

So one thing is the flood. Did you see how Mr. Ryan said to him, Mr. Hornberger, on cross-examination: Where are the records, the job files;

where are the checkbook stubs; where are the deposit receipts? Flood? Why? So that you should think that when this flood occurred or even if it didn't occur, that Mr. Hornberger was deliberately destroying his records so that the agents could not make the proper investigation.

Consciousness of guilt. The trouble with the attempts to always manufacture a situation -- situations out of purely innocent situations is that very often you can't meet them.

(continued next page.)

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1 Summation - Bender

MR. BENDER (Cont'd): You sit there in the Jury and you say, "Gee whiz, flood, everybody has a flood," just like everybody has a tin box, which I will come to. But if you keep anything of the evidence, you'll realize what Revenue Agent Gerimia said.

Revenue Agent Gerimia was there in 1969, 1970 and 1971. He says, "I auditied all the corporations. I had all the job files. I had all the closing statements." He had every one of the records including the corporation books, which are here. Almost two years, he looked at the job files and the contracts. He saw the records on the extras. He looked at the checkbook. He wasn't there for his health. We could assume that he talked to the girls about entries. He looked at the deposit receipts, the cancelled checks. He had everything. And then we know that every single ientry with respect to the house or houses is listed in these books. Contract price, the receipt of the amount of money, the job number, the costs on the house, everything is in these books.

What kind of nonsense, what kind of legerdemain, what kind of magic does the Government want to spell

over your eyes, what flood? What is the purpose of all this? To embarrass Mr. Hornberger?

There wasn't anything that the Government needed. It had it all in '69, '70 and '71. So -- and is there any doubt that the special agent was told about the flood?

So what did Mr. Mazzella do? At that time he didn't think it was important to investigate, did he? No. You know why? Because all of Mr. Gerimia's schedules, all the records that he needed. So he didn't investigate it.

Now, this is brought in and I'm sure Mr. Ryan is going to say: It says 1971, not '72. That's not important. The important thing is, he said the flood and the records were destroyed in the flood. He couldn't have said '71 because Gerimia was there and Gerimia had all the records.

The second -- what I call red herring -- the tin box -- wasn't that beautiful? Now Mr. Hornberger was cross-examined about that conference on September 14, 1972, when they showed him all of these huge entries in the stockholders' advance accounts, $246,00, not a hundred fifty-six. It's $248,000.

Where did all this come from? He says, "I

know I borrowed some money from my mother." He lied. They were all extras, says Mr. Ryan, in his opening statement.

"How much did you get from your mother?" he asked.

He says, "Between twelve and $15,000. Deposited some in my own account, deposited some in the corporation account."

Ladies and gentlemen, I want you, ifyou will, in your deliberations, to remember Defendant's Exhibits H to M. This is a schedule of the stockholders' advance account. This lists all of the credits that came to the account. It tris to identify them according to the records and it also lists all of the personal expenses which were charged against this account which were paid for by the corporations.

I want you to remember, here is a man who made $30,000 in one year and $80,000 in the other. He put back $23,000 into the corporation in 1967 and he put back $55,000 or a total of $78,000, roughly, of his salary. That is reflected right in these schedules.

Now, he put it back because the corporations needed the money. So that you have a total of

$78,000 roughly, from his salaries, which were put back into the corporations as loans to him.

He drew for personal expenses $56,000 in the two years. So that he drew out his own money. Yet, he had $156,000 in extras, which were, according to him, mistakenly credited as loans from him. Yet, he did not touch one iota of that $156,000 in the two years. They remained in as credits or loans from the -- from him to the corporation.

It is a significant fact because if he was a cheat, and he was putting the extra money back as loans, he wouldn't have just taken out $56,000 of the $80,000 or seventy-eight and put it in, which was his own salary. He would have drawn more because he could take it out. But he didn't.

Now, if you take his $78,000 and you add to it the $156,000, you see that he's got close to fifteen or sixteen, roughly, thousand dollars in credits which Mr. Mazzella says he didn't know what the source of them were. When that man said on September 14, 1972, to Mr. Mazzella, show him the stockholder advances, that part of that money came from my mother, there is no doubt that at least $16,000 of credits to that account could conceivably

and very easily have come from the mother and the fact is that these checks that we put in this morning, which reflect repayments, reflect approximately $16,000. He didn't say, "I got $150,000" or $156,000. or a hundred -- or $200,000.

I suggest that you can suspect very strongly the statement of Mr. Mazzella that my client said on September 14th that he got all of that money that was listed in the stockholders' advances "from my mother," I'll tell you why. Because we know that he couldn't have said that. $78,000 of his salaries were credited to the loan account. He could never in a million years have said that "$248,000, I got from my mother." And since it is a question of credibility, which you will have to decide, assuming that becomes important and I don't really -- I suggest -- think it does, you must consider what kind of a witness Mr. Mazzella was with respect to conversations he said that he had with Mr. Hornberger to which I'll make reference in a minutes.

Could I have the schedules you put in on Friday, the bank, cancelled checks and the deposit receipts?

6 Summation - Bender

MR. RYAN: I'm handing counsel Exhibits 108 to 111.

MR. BENDER: Thank you very much.

Now, in talking about Vicky Coletti, I merely want to point out, very briefly, that this was a woman who had a job to do. She tried to do it. She tried to do it well. She had a lot of things to do. And she made -- and she made mistakes. Just like anybody else could make mistakes. And the kind of mistakes that were made are reflected in some of the exhibits here.

She said in about 99 -- she said that -- she testified to what her procedure was. "I would try to mark," she said, "on deposit receipts and/or either deposit receipts or checkbook stubs what the sources of the deposits that were given to me, that were made into the corporation."

She said, "In 99 per cent of the time, I'm sure that I put something on the deposit receipts."

Now, these exhibits which the Government put in evidence, which are 110A and which were -- are kind of a little mutilated, I suggest you look at, because I think you'll find the kind of errors I'm talking about.

7 Summation - Bender

You remember that when I talked about the advance account, which is 11 in Evidence, I talked about this deposit of $5,000 listed in the stockholders' account of February 16, 1967, and alongside of it the accountant put in the word "note." And then on $4,000, there was "transfer," and here you see the notation "For salary." And here you notice there was a journal entry that you have heard us talking about.

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(Continued on next page.)

Mr. Mazzella testified that these items -- with the exception of the salary and the journal entry -- all came from checks from Mr. Hornberger's personal account. Mr. Mazzella was right, because you will find a check here relating to Horn Enterprises. I show you the check, 109-A in Evidence. Here's the check dated February 16, 1967, for $5,000. Look at what the deposit receipt says, "EEH note $5,000, February 16, 1967."

Obviously, it was not a note. It is a check. It's in Evidence.

I suggest that you look at all of these other deposit receipts and you will find on so many of them not even a notation -- a thousand dollars, $2,000 -- not even a notation of any kind, front or back. These are only a few that the Government has put into evidence and you will find in so many instances some of them are marked like, "EEH," you will find there is one marked "Advance, $2500," but you will find most of them just have nothing -- absolutely nothing.

Miss Laterno testified that she merely got from Vickie these deposit receipts and she looked for them -- to them to determine the source of the deposits.

Well, what did she do when they said nothing and how good was Vickie's memory of so many years that she put 99 percent of the sources on the deposit receipts?

Mr. Horn says that on the very first occasion when he gave Vickie the extra check to deposit in the corporate account, he said, "I believe I told her this is the extra payment which came from my personal account and which you know I had deposited into my personal account." I think we all know without dispute that there wasn't any girl that hadn't sent out the letters requesting checks to be made payable to Mr. Hornberger and Mr. Hornberger had taken those checks individually.

She was asked on page 130 by Mr. Ryan -- Mr. Ryan was questioning her: "During your period as the bookkeeper, did you ever receive any monies from Mr. Hornberger for deposit into the corporate account?

"Answer: Yes.

"Question: Can you tell us to the best of your recollection what Mr. Hornberger told you on the first occasion?

"Answer: I don't recall the first occasion, no."

She said, "I never discussed extras with Mr. Hornberger," but there isn't any doubt that she collected extras and you remember we put into evidence a letter from her acknowledging receipt of extras and she said she signed it herself because she didn't want anyone to think that she might have taken the money, so she in effect gave her own receipt.

"Question: Was there any discussion as to what advancement between EEH, when you made that entry?

"Answer: I don't recall any discussion.

"Question: No recollection at all?

"Answer: I am going back a few years."

Now the Court asked her did she take care of the payment of the bills on the extras. She said that she did. She said that she was the one that paid the subcontractors on all the extras, whether insulation, painting, carpentry work -- whatever it was. She paid them. She was the one responsible and she paid it pursuant to the contract. So she was completely familiar with the fact that the extras were paid -- were ordered and paid.

Now, she was asked about what records she had.

"I had job files containing all papers relating to the building of the house, I had the contract, the

correspondence. I had the building permits, I had the surveys, I had the title search, I had the index cards reflecting the extras ordered."

That is on page 148 of the transcript.

She said, however, that it was Charlotte Waugh's job to handle the extras. She said the extra girl handled everything and she collected money for the extras. They sent out letters requesting agreement on the extras. It was a policy -- standard policy.

At page 152 I asked her this question:

"There was no secret around the office that extras that were ordered were to be paid to Mr. Hornberger?

"Answer: Not that I know of."

Now, on page 155:

"In the form Mr. Hornberger gave you the money, you didn't know whether he was giving you money which represented payment of extras or what it was for?

"Answer: That's right.

"Question: It was just money coming from him?

"Answer: That's right."

Previously she had told us that this business of extras repaid to the corporation was a matter that concerned Mr. Canale and not her.

Now, Miss Waugh was the one who had problems because she didn't believe any of the contracts contained the extras and you remember the colloquy between her and the Court where she said, "the contract was for the main house, extras was something separate."

Well, she was mistaken.

We put into evidence 60 contracts which are AA in Evidence with a schedule showing you the names of the buyers which are listed in Government's Exhibit 145 in Evidence and I suggest, ladies and gentlemen, that you take a look at this and see how in the main most of the extras are included in here and this could hardly be a man who is a cheat, who wanted to conceal that he was doing extra work and putting the money into his pocket. These contracts all went to the bank -- to the Roosevelt Savings Bank. It is a strange crook that would let his bank know what he is doing, if he intended to steal the extras.

Now, it is a strange situation with Charlotte Waugh where she destroyed her index cards. Actually, that really didn't destroy the records, because there was correspondence listing all the extras in the job files.

Even without the index cards -- remember she

left in February of 1968 -- there was still records available. She would ask Mr. Hornberger, "Did you get paid for the extras?" "Yes," he would tell her, so she could acknowledge receipt. She kept track of all the extras.

When I asked her, "Well, why did Mr. Hornberger give you the contract?"

"I can't recall.

"Didn't he give you the contract so you could pick off the extras and keep a record of the extras?

"I don't recall."

She just didn't. You can't blame her for that. It is a long time ago. She didn't remember, but you will recall she got the extras for a specific purpose -- she was the extra girl.

Mr. Hornberger, the thief, tells her when he got paid and she would send out a letter to the buyer on the corporate stationery acknowledging the receipt. Standard procedure, she said.

Now, you remember she said she didn't recall that Mr. Hornberger changed the procedure in 1967. She thought the same procedure existed, but there is a letter in evidence which is a letter to a buyer, Dispoli, and that is Exhibit 28-A, B and C. It is a

letter dated January 13, 1967 and I suggest that you look at it because you will see that Charlotte Waugh sent out that letter and she did not ask Mrs. Dispoli or Mr. Dispoli to pay the extras to Mr. Hornberger. This is a significant indication that this experienced girl -- and she was -- and she was competent -- when she sent out the letter in 1967 -- in January -- and if the instructions had changed at that time, she would have asked that the payment of the extras be made to Mr. Hornberger. She didn't. This letter I would suggest to you is a fairly good support of Mr. Hornberger's testimony that he changed the procedure in 1967.

You remember I showed her two contracts and she said, "Yes, I looked at those two contracts and they do have extras."

I then asked, "Aside from these two, does that refresh your recollection?

"No, sir.

"It does not -- it is still your testimony that with respect to the vast number of extras you say they did not list extras?

"To the best of my recollection.

"In these two instances, for example where there

were extras and you saw the contract, what was your function with respect to preparing the record with respect to the extras?

"I don't recall."

Now, I just want to conclude Miss Waugh's testimony by reading you one page which I think makes clear the problems that existed and the errors that occurred. This is page 216:

"Did you make any record in any ledger or any book that the extras had been paid?

"No.

"Do you know whether any of the extras that were included in the extra price were reported or recorded into the books as income?

"No.

"Do you know whether any of the extras which you knew were paid were recorded by you or somebody in the office as having been received, other than the letters that you spoke of?

"Not to my recollection.

"Did you speak to Mr. Hornberger about that?

"When I was employed there?

"Yes, did you ever tell him that extras that you were receiving should be given to the bookkeeper --

you never did?

"No.

"Question: You never did.

"Now, you knew the extras were corporate income, didn't you?

"I didn't question it. My function was secretary.

"You didn't question it, your function was a secretary, but your function was to see that the extras were agreed to and paid for; isn't that right?

"Yes.

"You knew that Mr. Canale was the accountant, did you not?

"Yes.

"Did you know that Mr. Canale should have a record of the fact that the extras were paid?

"I would say that Mr. Canale would have a record of items paid for.

"You assumed that?

"Yes."

That was the problem here, everybody assumed that Mr. Canale picked it up and Mr. Canale, I suggest -- with his experience as a CPA and as a lawyer and his knowledge of the building business -- raises a

substantial question as to whether it wasn't really his responsibility to have seen that the job files and the contracts -- the closing statements were examined rather than to rely upon Vickie and rather than to rely on Charlotte Waugh. This is not to excuse Mr. Hornberger, but when it came to the records and the recording of income Mr. Hornberger had assumed that he had a competent attorney, competent girls, and he was out in the field trying to build houses and take careof the business. Mr. Hornberger's fault was a failure to recognize that these areas can occur, but that failure -- I submit to you -- is hardly a criminal intent and a criminal purpose and a desire to cheat on the taxes.

(Continued on next page.)

MR. BENDER: (Continuing.) Now ladies and gentlemen, I am not going to waste time talking about Mr. Canale's testimony or Miss Paterno's. I am simply going to say to you that you can find that Mr. Hornberger should have fired Mr. Canale the moment the agents came in and Mr. Hornberger discovered these errors. I suggest that you could come to that conclusion that he should have done it and I won't be surprised and I wouldn't blame Mr. Ryan if he said to you in his summation that he should have fired him. However, I don't think from the evidence the fact that Mr. Hornberger didn't do that, but recognized that this was a whole series of errors and that this man Canale had been with him for many years, that it was necessary to fire him.

Mr. Hornberger said -- I said to him, "How do we straighten this out?"

He said, "I want to pay the tax."

I said, "Unfortunately you can't pay it when a criminal is on. You have to wait until the criminal is over."

There is very little he could do. I think if anything it shows not a failure to recognize that Mr. Canale made the errors which places Mr. Hornberger

in this position, but rather a kind of a characteristic on the part of Mr. Hornberger that he just didn't want to blame Mr. Canale, just like he didn't want to blame the girls. I really do not want to talk too much about Mr. Canale. I think it is quite clear that Canale never told Mr. Hornberger that all that he was doing was recording the income in those big books from the deposits to the bank accounts. This is where the mistake was, because believe me if Mr. Hornberger really thought he was doing something, then Mr. Hornberger was really responsible for this whole mix-up by depositing the money in the individual accounts which prevented Mr. Canale from knowing about the deposits of the extras. But who in his wildest dream -- with all these records -- would have expected a CPA who you feel is competent to simply rely upon deposits to a bank account with the contracts around, job files, closing statements -- all kinds of records?

I think -- I suggest you can find from the evidence that Mr. Hornberger did not know how he was doing it. Yes, he was there when Mr. Canale or Miss Paterno took out the bank statements, the checkbooks, the deposit receipts, but that doesn't

mean that he didn't know or think or believe that he was taking out all of the other records. I think what really the government has done is simply create a situation of lack of communication and to say that this lackof communication -- this failure of Mr. Hornberger to what the situation amounted to a criminal ford, which I suggest is far from what occurred here. Mr. Canale was asked whether Mr. Hornberger knew how he was constructing the income from the bank records. What I am saying is I don't think he really knew. This was not his concern -- I mean he was busy building houses.

Now, we come to the agents and with them I think I won't bore you any more. I think you have been patient. I haven't any doubt that you have listened to this case attentively. I haven't any doubt that you are going to be fair to both sides. I know if you acquit my client or you convict him, justice will be done. In either event, justice will be done. I suggest there is certainly a complete lack of any evidence showing that there was a willful cheating of taxes on the part of my client. As his Honor said to you, it is not your job to determine my client's innocence, it is just your job

to determine whether the government has proven him guilty beyond a reasonable doubt.

What happened with the agents is almost a picture of "When we get you, we want to bury you" and "If we are not so sure we got you, we will think of something." I think the situation that happened with Mr. Mazzella with regard to his memorandum is an illustration like that. Here is a man who is a trained investigator. He sits down on September 14th, 1972 at a crucial interview with my client -- this is the first interview with my client -- this is the time he is to determine whether he is guilty or innocent. This is the time when he can find out whether he's concealing anything or not, whether he made errors or cheated. The first thing my client tells him is that he told the buyers to make all the checks payable to him and he deposited them in his personal accounts, but he believes that this was picked up as income.

Crook, thief, concealer? He writes down in his report -- he says his report was based upon his notes which he wrote -- notes which he made on September 14th and then went back the next day, September 15th, and dictated and had them typed. The

notes were fresh in his mind. Nothing in his notes about three checks from three homeowners showing payments to Mr. Hornberger.

We know that Mr. Greshin made a complaint and we know it's possible that he could have had a check from Mr. Walsh. There is nothing in his memo which says that he confronted Mr. Hornberger with the three checks, but what irked him -- what irked him was that I should say Mr. Hornberger told this to him. Why, because if Mr. Hornberger volunteered the information, then he didn't conceal anything, that it looked like Mr. Hornberger didn't think there was anything wrong about depositing the checks in his own accounts, but if he had said he didn't volunteer it -- and I asked him about it -- I asked Mr. Mazzella where is it in your memo -- it's not there -- it was in my notes -- it was in your notes -- you remember that two years ago?

He says, "Yes."

"Wasn't your memory fresher when you typed this or dictated it on September 15th from the notes you took on September 14th?"

"Yes."

"You put down in your notes significant facts,

didn't you?"

"Yes."

"And yet you omitted that?"

"Yes, I did."

"Where are the notes?"

"I destroyed them."

You know, this business about floods and this business about losing records --in the situation with Mr. Hornberger, the flood didn't do any real damage to the government because you have all these records here. Where are the notes?

Well, my memory is better today -- then the next thing -- you remember he comes on the stand the next day after the night of the recess and Mr. Ryan asks him -- says to him: Let's get back to the conversation on September 14th, and Mr. Mazzella tells us that yes it is true he did tell me that he told the buyers to make the checks payable to him and he'd deposit them, but he said only in a few instances -- in a few instances. Where didthat say that in his memo? Well, it wasn't in his memo. All that was there was that he said that he did it for a short while -- he interpreted that "short while" to mean a few instances. Here is a man,

Mr. Hornberger, who has been in the business for a long time and when he says "I did it for a short while" I would assume you would find 1967 and 1968 as a short while compared to '65.

Is there anything in the words "I did it for a short while" subject to an interpretation that "I only did it a few instances?"

I said, "You didn't tell us that yesterday, did you, Mr. Mazzella?"

"Yes, I believe I did."

Then you saw that charade where I gave him the record yesterday and I said "Go over it" and the Judge was good enough to call a recess and he let him look at it. Then after the recess I said, "Did you find it?"

"No, I did not find it."

I suggest, ladies and gentlemen, that you can find that Mr. Hornberger said neither that he did it in a few instances or that he told Mr. Mazzella that he told the buyers to make the checks payable to him only after Mr. Mazzella told him of the three other buyers I say to you, that is not important because he didn't lie on that occasion. He told Mr. Mazzella the truth -- "I put the extras

in my bank account. I thought they were picked up on the tax returns."

Mr. Mazzella, why didn't you recognize that? Instead we are here.

I never believed that I would be in a Court-room where three agents testified as to the accuracy of their schedules only to find that each one relied on the other and each one didn't know how accurate the other schedule was. I didn't go through this business with Mr. Mazzella of the overs and the unders because of my health, I wanted to show you that these books had thousands of dollars of over-reporting. Mr. Mazzella said there were some that were under-reported and you remember when they were charging extras to one corporation that I questioned that that should have beencharged to another and I gave the books to Mr. Mazzella and I said "Please show me where in the books these extras pertain to Dotal and not to Hornberger?"

What kind of an investigation was this? Mr. Mazzella couldn't even tell me by looking at the corporate books which one it was.

I suggest that from this evidence you cannot tell -- even though we have conceded in this

stipulation that $42,000 in extras were omitted in 1967 and some $113,000 in-'68 -- you can't tell really what corporation owed what taxes to extras.

Mr. Gerimia after he got through with his schedule said "You know I am not so sure it is so accurate. It's four years."

Mr. Vilardi said "I took Mr. Gerimia's schedule and I looked at the books and records, but I had nothing to do with allocating the extras to the corporations."

Mr. Mazzella said,"I had nothing to do with taking of the records from the corporations. I relied upon Mr. Vilardi."

I mean, it was a joke. Each one was relying on the other and each one couldn't verify the accuracy of the schedules.

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MR. BENDER (Cont'd): So that with respect to the charges in this indictment of how many dollars were omitted from Dotal, how many were omitted from Horn, how many were omitted from So-and-So, I suggest to you that you got a melange here. A complete failure of accurate proof on which you can contend or you can find, I should say, that an actual substantial amount was left off from each corporate return. But I say that is not important.

I say what is important is this: Mr. Hornberger took the stand. You know he's married. You know he's got four children. You know that he's such a thief that in 1967 with his wife working in the office, he didn't even pay her a salary.

What kind of a cheat is this man? What business man wouldn't pay his son, his wife, a salary, if he was thinking of taking a deduction and reducing the taxes on the corporation? He didn't do that in '67. Mr. Gerimia says the salary may have been excessive in 1968. He took $80,000.

Take a look at these tax returns. See what the gross sales were in 1968.

THE COURT: I thought I ruled on that.

MR. BENDER: You did, your Honor, I'm sorry.

THE COURT: Please don't go into it and as a matter of fact, I struck Mr. Gerimia's answer.

MR. BENDER: Yes, you did, your Honor. I'm sorry.

Just in case the Jury remembers it, I just wanted to tell them.

THE COURT: Well, one way to remember it is tell them not to forget it.

MR. BENDER: I don't want you to remember it but I think you ought to take the tax returns and look at the tremendous amount of building that was done which, as Mr. Hornberger said, required a tremendous amount of his time and his effort.

This man Hornberger was a busy man. Mr. HOrnberger is responsible, a responsible officer of these corporations, for the payment of the proper taxes. He will be held accountable in the proper forum.

Your verdict will not deprive the Internal Revenue Service of those taxes. Your verdict is only a criminal verdict. Your verdict determines whether he's to be convicted of a felony.

Ladies and gentlemen, I know I have been long but you'll forgive me. I suggest that you find errors

in this case. You find mistakes. We've admitted the omission of the extras. I think you could find that Mr. Hornberger's explanation as to why he engaged in this business of requesting extras to be made payable to him and deposited, is one that he believed honestly.

I suggest no matter how wrong you may think it was, he believed it honestly. I think all his conduct is inconsistent with criminal intent and I ask you to remember you've got some eight counts now that are left. Each charge charges a felony. Each charge is a separate charge. Each charge carries with it its separate punishment.

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(Continued on next page.)

Summation - Bender

MR. BENDER: (Continuing) I ask you to remember this: Mr. Hornberger's defense in this case and his claim that he did not intend to cheat on taxes runs across all eight counts. He's either guilty of all or he's not guilty of any.

I want to thank you from the bottom of my heart. I've made mistakes, too, and I've dropped papers. Forgive me. Don't blame my client for my mistakes. I've tried to give you what I believe honestly to be a reflection of the transcript of the record.

If you have any doubt in your mind, please call for it. Let it be read. If you have any question in your mind as to what Mr. Ryan or I say about the record, call for it.

I ask you to let this man go back to his family, his four children. I ask you to keep in mind what he has suffered all this time with this indictment. I ask you to keep one thing in mind, did the Government prove their case? Did they prove beyond a reasonable doubt that my client was guilty? Did they prove that he had that malicious intent to cheat?

I suggest, if you look at yourself, look at the

evidence, you can come to only one conclusion, that they have failed utterly and that this case really belongs in a civil court not in a criminal court.

Thank you.

THE COURT: We will suspend at this point for lunch, until 1:00 o'clock.

You will hear the Government's summation at 1:00 o'clock. Your lunch has already arrived.

They jury is excused. I want the lawyers here in court.

(The following occurred in the absence of the jury.)

THE COURT: Both sides spent a lot of time on trying to prove the intentional destruction of records or that the destruction was not intentional.

MR. RYAN: One side has done so far.

THE COURT: I have a request to charge from neither side.

Do you want me to charge on that?

MR. RYAN: Well, I had a charge about false explanations.

THE COURT: Well, I have that.

MR. RYAN: Destruction of records, I would just add a clause into that, including destruction of

records, false explanations which would aid in his defense.

THE COURT: Well, that's what Mr. Bender argued, that this was conduct that might show a consciousness of guilt and that's what you were trying to prove.

Do you agree that that's what you were trying to do?

MR. RYAN: I was disproving his explanation. I didn't undertake --

THE COURT: What's the effect of it, though?

MR. RYAN: I didn't undertake to prove this.

THE COURT: What kind of a charge?

Mr. RYAN: He offered it as a defense. And I undertook to disprove it.

THE COURT: All right.

I won't say anything about it.

I haven't gotten anything from either party and I've done some work on it, too, but if neither party wants it, it is evidenced by the failure to ask for it, it's all right with me.

Start your summation at 1:00 o'clock.

(Luncheon recess taken.)

AFTERNOON SESSION

ss 1

(The following occurred in the absence of the jury.)

MR. RYAN: Your Honor, the secretary is making a photocopy of our request on the destruction of evidence.

In the government's original request, we requested a charge about false statements, as evidence of consciousness of guilt, but your Honor, I am not clear. I think you said you are going to give a charge on false exculpatory statements.

THE COURT: That's right. That's something a little different than destruction of records.

MR. RYAN: Right.

I have a charge coming down. If your Honor cares to consider it, that's all right.

THE COURT: Are you ready for summation?

MR. RYAN: Yes.

THE COURT: Seat the jury.

(Jury present.)

THE COURT: Good afternoon. I think we are ready for the government's summation.

Mr. Ryan.

MR. RYAN: May it please the Court, Mr. Bender, Mr. Foreman, ladies and gentlemen of the jury, it

was one week ago that you were selected as jurors in this case and on that occasion I had my first opportunity to talk to you about what the government's case is all about and I told you that I have a last chance to talk to you, and that is right now.

As I said, as the attorney for the government in this case, my first job for you judges of the fact, the sole judges of the facts in this case, will be to assist you in understanding the government's case and then to convince each and every one of you of the defendant's guilt of the charges lodged against him and to convince you beyond a reasonable doubt, which is our duty.

So the first thing I'd like to do in assisting you in understanding the evidence is to point to what are the key issues in the case.

I have a blackboard here where I intend to, very briefly, in graphic form, lay out the case and point to the evidence as it was unfolded before you, because there are literally hundreds of documents in this case, and in order to evaluate the documents, you have to know how they fit in in the overall picture and the overall picture, we submit to

you, will demonstrate that this defendant, Elmer Hornberger, as a self-employed businessman, engaged in a deliberate, calculated scheme, to evade taxes, both taxes that he would owe as president of the corporationand as an individual,, sole stockholder. So let me start.

I'm going to draw three boxes.

THE COURT: Of course, that is a misstatement, Mr. Ryan. A defendant would not owe any taxes as president of a corporation.

MR. RYAN: He would have to pay as president of the corporation the taxes that his corporation owed for income. He writes out the checks.

THE COURT: It is a corporate tax. He writes out the check, you mean? He acts as president of the corporation.

(Continued on next page.)

MR. RYAN (Cont'd): Right. And as sole stockholder, one-man corporation, although in form the corporation pays the tax, the effect is it comes out of the bank account of the corporation and there is only one signature on that bank account, and we know those bank accounts pay for the country club, the private schooling, the oil, the pharmacies.

So my point is, that he had a real interest, a real factual interest. He can talk about corporations in form, but it is a bank account in a corporate name and he had a real interest not to write out checks to the United States Government. It's the country club that counts. That's my point.

Now, Box 1, I'm going to put down here E.E.M., personal accounts. Second box, I'm going to put down corporate accounts. Third box, I'm going to put down tax returns.

We start with the following proposition:

If a dollar was going to be reported on the income tax returns as income, right here in Box No. 3, it had to go in the corporate accounts. If it didn't go in the corporate accounts, it would never get on the tax returns because, as Vicky Coletti said, she would deposit the monies that Mr. Hornberger

gave her after the closing and at other times.

Trudy Paterno said that "I would take the check stubs with the information that Vicky Coletti wrote on it and I would put it in the corporate books, either as income, loans or other categories."

And Mr. Canale said that it was from the information that Mrs. Paterno would record that he would prepare the income tax returns. If it did not go in the corporate accounts, it did not go in the tax returns. It is as simple as that. And you don't have to be a multi-million dollar business man to understand that.

This system operated since at least 1959. That is seven years before 1967 came into play.

Mr. Canale had this system and the defendant knew it full well, and as Mr. Canale was -- admitted, the defendant knew it because Mr. Canale would come over to his shop and pick up the check books, not the job files and all that correspondence.

Really, what does that have to do with it, as along as the proceeds, the dollars, go into the bank accounts? That's the significant thing, when you talk about constructing come, recording receipt of monies during your business. It's what goes into

that bank account that counts, no matter what is in the job file. It's what goes into that bank account, and if it didn't go into the corporate bank accounts, it didn't go on the tax return.

And do you think Mr. Hornberger didn't know that? He sure did. Because, after all, we're not talking about General Motors. We're not talking about Ford Motor Company. Were talking about Elmer E. Hornberger. He's got an office. He's got a girl. He's got two check books. He's got a set of check books for his corporations. Then he had his personal accounts.

Now, it's very simple. If you're a builder and you're going to receive payments from buyers for extras, the check is made out to the corporation. It goes into the corporate accounts and is on the tax return.

So how intelligent do you have to be to figure out that if the check is made out to someone other than the corporation? It doesn't have to go in the corporate bank accounts. If it is made out to Elmer E. Hornberger, we know now where it went. It didn't go into the corporate accounts. It went into Elmer E. Hornberger, personal accounts, to the tune

of $156,000. When it went in here it was clearly identifiable as income from extras arising out of the building of these homes. We have documents. We have documents from Government's Exhibit 14 to 107, which prove by documentary evidence incontrovertible evidence that these monies were paid by these buyers arising out of the construction of their homes.

Mr. Bender mentioned a lot about -- in his opening statement and in summation -- we stipulated to $156,000. There's no issue on that. As if it was a magnanimous act by the defendant. But the documentary proof, we submit to you, is overwhelming and there really wasn't any choice and we could hav called 93 people here and we would not be summing up today. It would come much later in the summer.

So we called four buyers. But you have all the documents, so clearly we start out with the fact that the documentary evidence shows that this $156,000 is income.

Now, when this $165,000 comes from Hornberger's personal accounts and goes into the corporate accounts, we ask ourselves this question:

Does the documentary evidence show that when it got into the corporate accounts, it was identified

as income? The answer is: No. Why? Because the checks that Mr. Hornberger drew in his own handwriting said nothing about extras, not one word. And the only record made by Vicky Coletti who would receive these checks from Mr. Hornberger was on the check stub, E.E.H. So that when it got to here and had lost its identity and when it got to the record that Vicky Coletti prepared on the back of the check stub, E.E.H., sometimes advance, got to Trudy Paterno, E.E.H., advance, and it would go right into their books as a loan or a stockholder advance.

So, in effect, the $156,000 that he received shown by the documents in evidence, arising out of this construction business, lost its identity as income when it got to the corporate accounts. And if it wasn't recorded as income in the corporate accounts, it wasn't recorded on the tax returns as income. And what was it recorded as? As a simple loan by Mr. Hornberger to his coprorations. Not income. And certainly Mr. Canale, an accountant 15 years, was not making an error, was he?

The defendant, in order to avoid your finding that when the money got to the corporate accounts it had lost it's identity, tells you on the stand

that "I told Vicky Coletti under these procedures that these monies represented extras."

Vicky Coletti -- Mrs. Coletti, "Did you ever know anything about the receipt of $156,000 by Mr. Hornberger into his personal accounts?

"No."

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MR. RYAN: (Continuing) And of course, we do not have the checkstub. Vickie Coletti testified that with respect to each one of these checks, did not say extras. It said EEH, and she put it down. Vickie Coletti was not operating a million dollar business. Her function was limited to recording, as accurately as she could,the monies that were being received by these corporations, for Mr. Hornberger.

And there was no doubt in her mind when she testified, without the benefit of the checkstub book, that it said EEH, not extras. Nor was there any doubt in Trudy Paterno that when she got this checkstub it said, EEH.and it was posted in the books as EEH , advance, stockholder's advance. Not income. Just the loan. So even though we don't have the checkstub, which is alleged to have been lost in the flood, we have the two witnesses, who were closest to that checkstub in making the appropriate entries.

We have Vickie Coletti, following the defendant's precise instructions, EEH, not extras, not income. EEH, advance. And we have Vickie Coletti who got this same missing document at that time who saw EEH and it was recorded in the books, not as income, but as a loan by the defendant to his corporations.

Now, the defendant would have you believe,

according to his testimony, that he told the girls to put it down as extras. He believed that was being done. Vickie Coletti and Trudy Paterno are the two persons who were closest to making those entries and who had absolutely no motive to make up anything.

And putting down EEH as the identification of the monies transferred from the personal to the corporate accounts was not a product of Vickie Coletti's imagination.

Do you really think she dreamed this all up, made an error? Now the defendant's claiming he's the victim of mixups. You really think Vickie Coletti was mixed up? When she got these checks and she had to know how to identify this? And the defendant told her put down"EEH advance."

So in very brief summary, I hope I have assisted you in understanding that by the introduction of this personal bank account, this $156,000 lost its identity as income and it was therefore not recorded in the corporate accounts as income and not recorded on the tax return as income. Simple as that.

Now, the defendant gives a reason for having all of this $156,000 made payable to himself personally. You're going to have to decide the

defendant's credibility. Is he a dumb person? He's a college graduate, majored in Math and Science. He started in this business forming corporations, and by the time of '66 and '67 was doing over a million dollars a year.

Do you really think he was that stupid? This was a one-man operation. Doyou think he could be that dumb as to not know what was goingon under his control? And who had the greatest interest to control the events in this case when they were operating in that office? The president and sole stockholder, Mr. Hornberger.

He says that,"We had some trouble in 1966 with buyers at closings. We were getting into disputes over extras. We were negotiating and I would be reducing the price. At that time checks were made out to the corporations, so I decided to relieve the corporations of this responsibility. That sounds nice, in words, but when he talks about relieving the corporations of responsibility, remember again, we are not talking about General Motors. We are talking about one man, Elmer E. Hornberger, the president and sole stockholder.

And really what was he relieving them of? If

you can believe that. If there is a dispute over extras, delay the closing, demand payment in advance. And if you care to, you can examine the documentary evidence on some of these 93 purchases and you will see, and as Charlotte testified, we wanted money in advance before the construction started.

So really, how does this require checks to be made out to him personally, if there was some problem in disputes over extras and whether or not they were done and done properly? The checks could have been made out to the corporations. Remember Mr. Rizzi? Before the closing, long before the closing, he wrote a check out to the corporation and he got bawled out by the defendant and this was long in advance of the closing. Bawled out? Why? All the defendant had to do was deposit that check, that $1500 check into the corporate account and see if it clears .

And if you look at the documents, you will see that the 1500 didn't deal with construction. It dealt with land. A piece of land Mr. Rizzi bought. So why did Mr. Hornberger find it necessary to call up Mr. Rizzi long before the closing and bawl him out for making the check out to the corporation instead of to himself? And he got Mr. Rizzi to the

point where Mr. Rizzi was apologizing.

How about Mr. Kmetz? Was there any problem prior to that closing? Mr. Kmetz went to the defendant's office and said,"How much do I owe you?" He's willing to pay. If he didn't want to pay, or if he wasn't satisfied, he wouldn't want to pay, would he?

And when he gets down on the date of the closing, he says to the defendant, -- not at the closing, this is at his office, sometime the same day: "How much do I owe you for the extras? And I'd like to have a receipt."

And a tape is made up with the amounts on it and the extras are written next to it and he writes out a check, Elmer E. Hornberger.

(continued next page.)

MR. RYAN: (Continuing.) Why wasn't that check made out to the corporation? What was the problem? There was no problem between Mr. Kmetz and Mr. Hornberger, none whatsoever. How about Mr. Walsh?

We didn't call 93, we called only 4. Let us take those 4. What was the problem with Mr. Walsh. He was wil ing to witte out the check at the closing. He had no problem. If he wasn't satisfied, he wouldn't be writing out a check. So why did the defendant insist that the check be made out to him and not to the corporation? What legitimate reason was there? The reason he gives is to cut down the haggling. What haggling was there from the four buyers we did call? Zero.

How many law suits did he institute in the two years in question? Zero.

So what do you think of the reason of having these checks made payable to him that he offers? You are the judges of the facts. You use your common sense. You put two and two together.

Let me say this: Is there anything wrong if he wants to sue people as an individual. relieve the corporation of this responsibility, to have

them make the checks payable to him and just endorse on the back "Elmer E. Hornberger, pay to the order of Story Book Homes" and deposit it into the corporate account? What was to prevent him from doing that, nothing, if he wanted to report this money as income?

What reason was there of depositing it into his personal account as opposed to endorsing the checks over and depositing them into the corporate accounts? What legitimate reasonwas there? Is there a legitimate reason or is the reason that this man was engaging in an attempt to invade the taxes on $156,000 payable to him? Can you find a legitimate reason? He says "I wanted to put it into my accounts and hold it as operating funds for my corporations." You look at the accounts, does it say "Elmer E. Hornberger, in trust for Story Book Homes" or "Horn Enterprises"? You look at the accounts and see whether it says "Elmer E. Hornberger, Special Account" or whether it says "Elmer E. Hornberger."

He uses these accounts for receiving money paid to him for his personal business, apart from his corporate businesses. He uses these accounts

as well for his country club, personal expenses. If he really wanted to keep an accurate record of $156,000 as income, as opposed to an attempt to evade taxes, do you think -- would he not -- that he would keep some kind of record that this 186 in income either by opening a special account for the corporations and not comingling it with his personal funds or to keep a list somewhere in the office that these moneys being deposited here should go into the corporate account as income? Nothing like that. He didn't want to keep a record like that. The only record he wanted to keep was that it went into his personal accounts and when it came out I told Vicky Coletti to put "EEH -- EEH Accounts." By doing that Vicky Coletti, Trudy Paterno and Thomas Canale would never know that this was in fact income from the defendants' business.

Now, Vicky Coletti testified to the circumstances under which the money went from personal to corporate.

The defendant testified "I wanted to be able to sue these people in my own name, that's why I had the checks made out to me. I would deposit it

and after it cleared, I would write it out to the corporation."

Did it happen that way?

Well, Mr. Bender referred to thatlist of checks going from personal to corporate aecounts. I think you will find from your examination that it wasn't done tnat way, just by looking at the times and the amounts. Then you turn to Vicky Coletti and what does she tell you?

She tells you, "At the end of the week if we were low on cash or overdrawn on the account -- we didn't have the cash on hand -- we wanted to pay bills, I'd tell him and he's give me a check."

You will see 4,000, 5,000, 3,000, all round figures.

Mr. Bender said that the corporations were going bankrupt or something like that. If you have to pay your bills within a short period of time, it doesn't necessarily follow that your corporation is starting to sink. As a matter of fact, the defendant admitted to you that his corporations were doing quite well. It was just a question of providing the funds to meet the payments and after all when the money went into the corporate accounts,

the defendant used these corporate accounts for his personal purposes? The answer is "Yes." In one year to the tune of $33,000 -- he wrote out checks as president of the corporations from those bank accounts to the extent of $33,000. That is a lot of personal expenses, isn't it?

When he was writing these advances into the corporations, who was really benefiting by keeping these corporations going to pay all of these personal expenses? Who was the sole stockholder, Elmer E. Hornberger.

No matter how much he likes to rely on the form of a corporation, who was the real beneficiary of keeping the corporations going? When the gas went dry in the tank, put a little more gas into the tank -- keep that motor running.

When Vicky Coletti said, "We are a little dry, we need some cash? Sure, here's 5,000, put down EEH." Then they could meet the bills and keep it going -- keep the income generating and then the checks go out to a country club and private school.

These deposits into the corporate accounts are for the sake of our discussions approximately

$156,000. They are critical -- they were critical because the identity of those deposits determined whether or not income should have been reported on the tax returns.

When Agent Mazzella went to see Mr. Hornberger, he wasn't asking him about one or two deposits. He testified that he asked about each and every one -- that they went over all of these deposits. They weren't talking about $16,000. The Internal Revenue Service wanted to know what explanation was there for the deposits of approximately $156,000 into these corporate accounts. Do you think the defendant, a college graduate, has a Bachelor of Arts, majored in math and sciences, had a million dollar business -- that he didn't know what these questions meant?

Could he have admitted at that point that the $156,000 came from income without opening himself wide to an admission of guilt? At that point Agent Mazzella only knew about a couple of these checks payable for extras. It was later in the investigation that it was developed to 92 or 93. At the time Mr. Mazzella went there on September 14th -- as he testified to -- he only had a couple. You

can imagine that it must have taken a lot of time to get the 93 payments -- payments of 93 buyers, because remember the defendant's records were destroyed in a flood according to him.

When Mr. Mazzella asked him about each and every one of these deposits -- what the source of them were -- he did not say that the defendant did not say that they were extras -- with respect to a few extras there was a short time -- once in a while I would have them make the checks out to me -- the deposits into the corporate accounts my mother loaned me money.

He was asked by Mr. Mazzella "Where did your mother get the money?"

Mr. Hornberger said "My mother got it from my father."

"Where did your father get it?"

"From my grandfather."

Then he has the audacity to get on the stand before you and say that that money was kept in a tin box, in a crawl space, near the plumbing in the basement of his mother's house to keep that phony explanation.

You as judges of the facts do not have to

accept anything. You have to evaluate credibility and the reasonableness of a story.

Do you think that this defendant had any motive to give a false story here, just like he had a motive to give a false story to Agent Mazzella? Of course he does. If he can convince you that he should be acquitted and he was pressing that mother loan explanation to the point where he had to turn to the Judge and ask "Do I have to answer that?"

"Yes, you have to answer that."

"Where was it?"

"In the basement."

"Where in the basement?"

"In the crawl space."

"Where in the crawl space?"

"Next to the plumbing."

Do you think that Mr. Mazzella is making all this up when he testified: "I went over all of these items and he didn't tell me it was extras. He told me it was from his mother."

That is why there is this false story about the moneys from his mother. You know you don't pay income tax if someone gives you a gift -- so it wouldn't be income. His story at this point is that

it isn't income, it is from my mother, but later the investigation continued and now we get to the point we have documentary evidence of -- 93 transactions to the tune of $156,000 that shows that the money that went into the corporate accounts was in fact income -- as simple as that --- as simple as that.

Now, Mr. Bender in his summation said that with all of these documents--- hundreds of documents -- if you are going to commit a crime, how would you commit it having all these records available?

The first thing we know is that it was not discovered -- despite the fact that it was going on for 1967 and 1968 -- it was not discovered by the Internal Revenue Service until someone filed a complaint, Mr. Greshin.

First of all, despite all the documentation under which this defendant was operating no one discovered it. In fact, not even Mr. Greshin discovered it. He suspected. Mr. Bender says that all the girls knew about the records and things of that nature.

Now, we turn to a critical factor for you the

judges of the facts.

Who knew -- who knew in his shop where the $156,000 went? Charlotte Waugh wrote letters out to make the checks payable to Mr. Hornberger, Certainly the other girls must have known it because here is Charlotte Waugh typing up these letters. Sophie Zaluski was asked what she did in the office -- who knew what happened to that money -- only one person, Elmer E. Hornberger.

Who was it that opened the mail and took the checks out of the envelopes when the mail came in in the morning? You are the judges of the facts. The defendant says "I only did it some of the time. The girls come in and they'd have the mail open and lie it out for me. Charlotte Waugh would lay it out for me."

Is that true from the testimony? Is he trying to put one over on you?

Of course, if he had admitted that he opened the envelopes and took the checks and deposited them himself into his personal accoun t, that would be devastating -- that would be devastating, wouldn't it? That would go to this critical juncture (indicating). That would show that he was

the only one that knew the money was going into his personal accounts.

Just as he had to give an explanation about this juncture (indicating) he had to give one here.

Mrs. Coletti was asked: "Did you open the mail in the morning?"

"No."

"Who did?"

"Mr. Hornberger."

Now, Charlotte Waugh: "Did you open the mail in the morning?"

"No."

"Who did?"

"Mr. Hornberger."

Mrs. Perrini who was there only for a short time: "Did you open the mail in the morning?"

"No."

"Who did?"

"Elmer E. Hornberger."

There you have it, ladies and gentlemen, three witnesses who have absolutely no grudge against Mr. Hornberger -- no motive to make up anything. They testified that it was Mr. Hornberger who opened the mail, who had the opportunity to get

these checks and do what he wanted to do with them without anyone else knowing about them.

(Continued next page.)

MR. RYAN: This defendant in the face of those three said to you, "They come into my office and lay it out for me. I would make a comparison with the extra documentation, determine whether they were paid." Do you believe that? Do you believe that, you, as the judges of the facts? You don't have to accept anyone's word. Forget about the testimony for a moment -- just forget about it.

Look at the documentary evidence in this case. How is the $156,000 treated when it got into the corporate accounts. Personal loans, not income. On some of the deposit slips that Mr. Bender referred to, there is a even a notation on a few of those "advance." If you want to look at them, you may.

Now as Vicki Coletti testified, and as you probably know from your own experience, if you deposit a check, you make out a deposit slip at the bank and you put the check down. Do you have that deposit slip when you walk away from the bank? The answer is no. You have a receipt. The bank keeps the slip. Vicki Coletti was clear in her testimony in the distinction between a deposit receipt and a deposit slip. She would get a deposit receipt and she would make an entry on the check stub.

Whoever it was that deposited these monies to the equipment accounts, made a notation on some of those -- not that it was extra income -- but put right on the slip "advance". Isn't that a coincidence that some of the deposit slips do say "advance", that they were able to get, check stubs we can't get -- they were lost in a flood, remember.

But some of the deposit slips, the Internal Revenue Service was able to obtain showed in some cases, an advance. Can you say that this recordation of the money deposited into the corporate accounts by Vicki Coletti was the product of her imagination or did the defendants direct that that not be put down as income, but as an advance by him. That is what you have to do in evaluating the testimony.

Apart from any testimony in this case, you look at the corporate records. Do they say that this money transferred from personal to corporate accounts, is income in any way? Certainly Mr. Canale was retained to accurately prepare tax returns and keep records. The corporation's own books show not a dime of this was treated as income. The tax returns show that they were personal loans due to the shareholder -- I believe there is an amount of $360,000 in one year that the

tax return says was owed by the corporation to Mr. Hornberger -- so apart from any testimony in this case, if you just take all the documentary evidence that we were able to produce for you, they will show that this money was treated not as income but as loans, and that is apart from the testimony of the girls in the office.

You put it together -- two and two together, and use your good common sense, and what conclusion will you come to -- was this reported as income? No.

Now, Mr. Bender makes a point that you are unable to determine how much each corporation under reported, because there are several counts in the indictment, and because this defendant operated under essentially, for this case, four corporations.

Now, Mr. Mazzella as part of the case, undertook to determine which corporations did which jobs. As part of that, he used information obtained from the corporate books and records as shown to him or Mr. Vilardi and Mr. Jeremiah by Mr. Canale.

Mr. Bender would like Mr. Mazzella, Mr. Vilardi and Mr. Jeremiah to do the whole thing over again, but the fact is that they -- that based upon a review of the corporate books, it shows that the 93 jobs

which we have been talking about were treated by the corporations in specific locations.

Job No. 23 was shown in the corporate books and records as a Story Book Homes job. That's what Mr. Canale said. Where do you think Mr. Canale got his information? He got it from the job numbers on the check stubs, prepared by Vicki Coletti. Where do you think she got the job numbers from? Her boss-- the only one -- he could have signed any number to any one of his corporations in allocating the funds.

If you find that is reliable -- you, as the judges of the facts -- you just have to take Mr. Mazzella's schedule where it lays out as to how much each corporation should have allocated the income from the extras.

That schedule, we submit to you, is as reliable as you can find, and I do not recall Mr. Jeremiah having any doubts about his examination of the work sheets, though Mr. Bender does.

So, ladies and gentlemen, when we get to the point of the tax returns, do not forget the schedules prepared by Mr. Mazzella for each corporation, and the excess on each one.

Now, let us turn to the tax returns. Very simple

again.

Let us assume for the moment, you are engaged in your own business. If there is anything that you want to know as an individual businessman -- even operating as a corporation -- it ishow it is doing.

You may be getting your salary and paying for the country club, but you want to know how you are doing. Are you starting to lose and won't be able to make those payments? How are you doing, that is the question you want to know.

If you were a business man in that circumstance, who would you ask that question of? How would you find out how you were doing? You'd go to the man, would you not, that you are paying to find out how you were doing. You would go to the man that you have implicit faith in, your accountant, your attorney, Mr. Canale, who represents a lot of builders and you would ask, "How are we doing, Mr. Canale? I will give you a balance sheet, Mr. Hornberger."

As a matter of fact, when it comes down to approaching April 15, 1969, all you have to do is look at page three and four, and you will see a balance sheet right there. It shows how you are doing.

You are doing all right. You are making a little

profit, not paying too much taxes.

But this defendant, who would have you believe that he didn't discuss the recording of his books with his accountant, and how the corporation was doing, but instead, who did the defendant tell you he asked about how the corporation was doing? Vicki Coletti-- he asked Vicki Coletti how he was doing.

Why does he tell you that? Because he doesn't want you to believe that he knew precisely how he was doing, precisely the books showed the monies were being treated as loans by him, through the corporations and he even gets to the point that after he signs these returns, he has to admit his accountant -- who he is paying all this money -- gave him a copyof the return.

"Did you look at the return? Just the first page." Only looks at the first page and not at page three or four, the balance, the balance sheet, which shows all of these loans due from the corporation.

Can you believe that -- can you believe that as the judges of the facts, or is it that this defendant is trying to put one over on you -- trying to put one over on you.

Judges of the facts, nobody has to put anything

over on you, not the Government, and not the defendant. You are mature and intelligent people and you can use that maturity and that intelligence, together with your experience in your everyday life. You do not have to accept that explanation that this man just filed his tax return, and never looked at the books. You may find he didn't want to look at the books, because he'd be afraid of what he saw there, that all that money was not recorded as income, but as a loan from him to the corporations.

Ladies and gentlemen, I see I have been talking for about fifteen minutes. I could go on longer, but I choose not to. I choose not to because you have heard the evidence. I hope I have assisted you in understanding clearly this tax scheme perpetrated by this defendant for the sole purpose of evading taxes.

As Mr. Bender said, it is true the defendant has a family, but the enforcement of the law cannot depend on personal circumstances of a defendant. You, as judges of the facts, are to decide the facts as they appear before you, asshown by the evidence, and if you are convinced beyond a reasonable doubt that this defendant purposely, wilfully, deliberately, sought and attempted to evade his corporate and individual

taxes, you should have no hesitancy to convict, because whether you are a wage-earner, or a self-employed businessman, you have got to shoulder the burden of paying taxes. That is the price of a democracy. We cannot live togehter unless we have a government. This courthouse would not have been built without taxes.

If you are convinced beyond a reasonable doubt, you should have no hesitancy to convict. It is not a pleasant duty, but it is your duty as jurors.

We can have all the IRS agentsin the world, we can have all the laws in the law books, but unless we have a jury who is convinced beyond a reasonable doubt as to convict, they mean nothing -- nothing at all.

Ladies and gentlemen, it's been a pleasure to appear before you. This case started when Mr. Gresham filed his complaint, and it ends today, July 1. I want to thank each and every one of you for paying close attention to every aspect in this case, and I wish you the best of luck in your deliberations.

Thank you.

THE COURT: The jury is excused. I will start my charge in just a few moments.

(Jury leaves courtroom).

THE COURT: Mr. Bender, do you have any opinion as to what the charge should be on the destruction of documents, if they find they were destroyed?

MR. BENDER: I certainly would object to the Government's supplemental request number fifteen.

THE COURT: On what ground?

MR. BENDER: Well, I think the evidence seems to indicate that certain records were lost, whether they are relevant documents in the sense that the Government did not have access to other documents that are here in this court, upon which it relies is another reason why I would object to that language.

THE COURT: Let us assume that the jury finds that this defendant knowingly and wilfully destroyed the records after he was advised that there was an investigation concerning his taxes.

Suppose they make that finding, what is the consequences of that?

MR. BENDER: If the jury finds that he destroyed records?

THE COURT: That is right.

MR. BENDER: They can find it is some evidence -- if he destroyed the records with the intent to

conceal them from the Government, I think, the jury can find that they could consider that as some evidence on the issue of wilfulness.

THE COURT: I remember any number of charges on the destruction of records. It is usually under the heading "suppression of evidence." That is not the usual charge I give. Iusually charge, if the jury finds that a party knowingly and wilfully destroyed records, and they find that they were material, they may draw the inference:

1. That the records would be in support of the Government's position in this case -- to support the Government's position or the other one which sounds like it, thatit would be adverse to the position of the defendant.

Masters has a form which I am not too happy with because it is not specific enough. It just says that if they find that the documents -- that there has been a suppression of evidence -- I don't remember the exact language -- that it would be adverse to the defendant.

So much has gone in before the jury on the destruction, that I think they are entitled to know what the evidence means.

You more or less argued this way to the jury

that they may consider it as circumstantial evidence of the defendant's consciousness of guilt --

MR. BENDER: I said the Government is contending that, that is why I referred to it.

THE COURT: I thought that waswhy you were offering it that way --

MR. BENDER: I was trying to argue that the Government's argument was a fallacious one.

THE COURT: What do you think the charge should be, that he knowingly and wilfully destroyed records and that they were material to the issues in the case?

MR. BENDER: I think that if the jury should find that the defendant deliberately destroyed evidence -- relevant evidence, with the purpose of prohibiting or impeding or obstructing the Government from obtaining that evidence in support of their contentions in this indictment, -- thatif such evidence was not available and had not been reviewed beforehand by the agents -- that they might consider that assome evidence bearing on the issue of the wilfulness of the defendant as charged in the indictment. I think that would have no objection, if your Honor wanted to so charge.

MR. RYAN: Well, I would --

MR. BENDER: I would prefer that you didn't make any such charge.

THE COURT: I know; but there is evidence in the record, and you brought a witness in at the end to prove that there was a flood in fact that destroyed the records.

MR. BENDER: I had to do that because the Government raised it.

THE COURT: How does the jury treat the evidence?

MR. BENDER: I don't know.

THE COURT: I think I am here to tell them.

MR. BENDER: I know, but your Honor didn't want to tell them about a lot of other things, too. You said we should argue to the jury about it, and we both tried to argue to the jury.

So I think maybe it might eliminate any possibility of what should be the proper charge, if you don't tell them anything.

THE COURT: Well, of course it would be easier if I just said nothing to them and at the very outset when I begin my charge just say nothing more than, "You heard the evidence, now go in and tell me whether he's guilty or not guilty."

2 MR. BENDER: No, that's not true. 1059

THE COURT: That is extreme, I know, but that is the same logic.

MR. BENDER: No. I think in this case in particular I think your Honor's charge would be most instructive and most important.

THE COURT: Since I am not getting any guidance from the defendant, I will use some charge.

I do not know. I might take Mathis charge only because there is some support for it.

MR. BENDER: I thought I tried to help you, your Honor.

THE COURT: No. I am not summing up and saying, "And if you find that the Government got the evidence elsewhere," that is only on whether it is material.

We are talking about state of mind. How does he know whether they got it elsewhere? If he destroyed the records and he felt it was material to the case, and he was faced with a charge, there is no question in my mind that some adverse inference should be drawn against him regardless of whether the Government could have gotten the evidence elsewhere or did get the evidence elsewhere.

MR. BENDER: No. I didn't say that, your Honor. I didn't make myself clear.

3 THE COURT: You said they looked at the records. How do you know what they found?

MR. BENDER: I examined Mr. Gerimia about it.

THE COURT: And he went through the whole mass of evidence and he knew everything in there? And he recorded everything?

MR. BENDER: All I know is, your Honor, I can only tell you what he said. He said, "I audited all the corporations. I went through the sales contracts, the job files." He says, "I went --" -- he went through the checkbooks and all, so they had this stuff.

I think that this is a red herring. That's why I did as I did.

THE COURT: I know you have been telling that to the jury. You talked about three or four red herrings.

MR. RYAN: The point is, your Honor, that --

MR.BENDER: Might even be a matjes herring. I'm not sure.

THE COURT: I think it was. I think it was closer to a matjes than a red one. I do not know what that means, a red herring. Everytime there is no logical response to a charge, it's a red herring.

MR.RYAN: But the point is --

4 MR. BENDER: That's true.

MR. RYAN: Destruction occurs two days after defendant is aware it's a criminal investigation. Just an audit in the beginning, when Gerimia looked at it. Then Mazzella comes on the scene September 14th. Two days later there is a flood. Special Agent conducting a criminal investigation.

MR. BENDER: That's not true.

THE COURT: Do not get into a private dispute.

The point I want to make is that if the Government requests a charge on suppression of evidence, I shall give one. I would like to give the right one, but I am getting no enlightenment from you on this issue, Mr. Bender. I am getting just heat.

I will try to do the best I can.

(Recess taken.)

(The following occurred in the absence of the jury.)

MR. BENDER: The defendant is just in the bathroom, your Honor.

Your Honor, I feel badly about the fact that you felt I couldn't help you on this, but I didn't know how much more I could do.

THE COURT: No. I have done a lot of work on failure to call witnesses. It's all suppression of

evidence and there are any number of cases on it and I've got the -- this is the form DeVitt & Blackmer, 1199, "An attempt to suppress or fabricate evidence by a defendant after a crime has been committed is not, of course, sufficient to establish guilt. You may consider evidence of such an attempt, however, along with other evidence in the case in determining guilt or innocence. Whether or not attempts at fabrication or suppression of evidence show consciousness of guilt and significance to be attached to any such attempt are matters for the jury to determine."

Now, on destruction of physical evidence, there is a case in the Sixth Circuit, United States against Mazioni, and it says, "The same is true of evidence of destruction of material items of proof."

There is a long discussion that I have read some time ago in Wigmore, on the inferences that may be drawn, but because of the lack of time, I think it safe enough to charge the form in Mathis. I am not too happy but -- I mean, in DeVitt & Blackmer. I am not too happy with it, but I think the Government is entitled to a charge if it requests it.

MR. BENDER: I, of course, will except to that charge, as you know.

THE COURT: Yes. You tell me what else --

6 is the charge you suggest the one that you gave to me?

MR. BENDER: Yes.

THE COURT: They first have to be -- if they find that the witness looked at all the evidence, then they can't draw any inference at all?

MR. BENDER: No. I'm -- yes. I'm saying that it's not material or relevant if they had it.

THE COURT: All right. I get the point.

Seat the jury, please.

(Continued on next page.)

Charge of the Court

(Jury present.)

THE COURT: Mr. Foreman and ladies and gentlemen, I see that you are thumbing through a form I distributed called "Memorandum of Verdict."

I took what I believe to be the heart of the charges in the indictment. I will read the entire count or counts in the indictment and the portion that I excerpted from those counts that will serve to recall the nature of the count or the specfic charge.

I will say at the outset that there are a lot of numbers, amounts, in the Memorandum of Verdict, as there are in the indictment. Do not be concerned about remembering every amount. They are only important to impress upon you the fact that in the first six counts, 1, 2, 3, 4, 6 and 7, the Government charges a willful failure to evade a substantial portion of the tax due. The figures are to remind you what the Government's claim is.

The Government does not have to prove the specific amounts but the Government must prove that there was a willful attempt to evade a substantial portion of the tax due.

I tell you that at the outset, because you

might try to remember the amounts and it might divert your attention from the case. I am going to try to keep your collective eye on the issues in this case. That is most important.

You can lay this aside and when I come to the charge, I will tell you the significance of it and why, when you keep it with you in the Jury room during your deliberations, you may find it useful.

At the outset of every trial, and again now, I think it is important for you to keep in mind who the participants in a Jury trial are and what their function is.

The criminal trial is called an adversary proceeding and so we have adversaries. The Government on the one hand and the defendant on the other. The theory being that when two lawyers of comparable ability compete over a contested issue, the evidence will be brought forth and the facts developed for the Jury to see. And the system has worked well for hundreds of years. But you must recognize that the lawyers for the litigants, the Government on the one hand, and the defendant Hornberger on the other, are protagonists. They are partial. They are interested in their client's cause.

And that is the way it should be.

Now, as between the Judge and Jury and the contestants, the significant difference is pointed out in that fashion. The Court and Jury are objective, impartial, interested in giving a fair trial. And that means that the findings, the determinations and decisions must be made impartial, free of all bias or prejudice or sympathy and in accordance with the law.

The Jury are judges in this case. You are judges of the facts and for the purpose of this case, more important than the judge of the law, because you and you alone will decide what happened in this case, what was the state of mind of Mr. Hornberger at the time the activities took place and then ultimately decide the guilt or innocence of the defendant Elmer E. Hornberger as to each count in the indictment.

I have no opinion on the guilt or innocence of Mr. Hornberger. That is solely within your jurisdiction. And just as I accept your findings, so you must accept the law as I charge it.

Not all of us are happy about the tax laws, particularly as they affect ourselves. I suppose we all wish they would go away. But that has nothing

to do with the case. I have an obligation to charge you on the law as I understand the law to be. You have the obligation to accept the law as I charge it, even though you may not like it, even though you may disagree with it, even though you feel that, well, you could do a better job. For the sake, again, of fairness and justice, it is important that you apply the law as I charge it, as it is substantially charged and applied all over the country, wherever our income tax laws prevail.

So, you have a duty to accept the law as I charge it, as I have a duty to accept your verdict as you find it.

The defendant is presumed to be innocent of each and every charge in the indictment. He has pleaded not guilty to each and every charge. The law requires that you assume his innocence on each and every charge at the outset of the trial and throughout the trial and throughout your deliberations and the presumption of innocence alone is enough to acquit a defendant.

I think I referred to a Scotch verdict when you first were chosen, to emphasize what we mean by the presumption of innocence.

In Scotland they have three verdicts: Guilty, not guilty, not proved. In this country we have only two: Guilty and not guilty. And not provide is included in your not guilty verdict.

In other words, the Government must prove the guilt of the defendant by proof beyond a reasonable doubt and if it fails, then just as in Scotland, where the Jury might say "Not proven," here you say "Not guilty."

Now, what is a reasonable doubt? It is a doubt that a reasonable person would have after carefully considering all the evidence in the case. A reasonable doubt is based on reason and common sense, as distinguished from a doubt based on speculation or imagination or some vague or fanciful whim that you might have.

A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt is proof of such a convincing character that you would be willing to rely and act upon unhesitatingly in the most important of your own affairs.

The defendant need not offer any proof of innocence. The defendant may rely on the failure

of the Government to prove the guilt of the defendant.

The Government's burden is not to prove the guilt of the defendant beyond all doubt nor is it the Government's burden to prove that every bit of the evidence offered in the trial is true beyond a reasonable doubt.

The burden of the Government is to prove each and every essential element of the various crimes charge beyond a reasonable doubt.

Reasonable doubt may arise from the state of the record or the failure of the Government to offer proof. Evidence is the method that the law uses to prove or disprove a disputed fact.

There are two general categories of proof. One is direct proof, the other indirect or circumstantial proof or evidence.

Direct proof is the testimony of witnesses of what the witness saw or heard on a disputed issue.

Circumstantial evidence is the method of proof by which a Jury draws reasonable inference from established facts based on experience and common sense.

Those abstract definitions probably do not

convey the idea strongly enough, so I give an example of direct and circumstantial evidence that I have used for a long time. The important thing is to identify the issue.

Now, in this case, the obvious issue that there is no direct proof on is the state of mind, with what intent the defendant did certain things, directed the purchasers to make the checks payable to himself, deposited the money in the bank in his personal account, took money out of his personal account and put it in the various corporate accounts. Was it with criminal intent?

Well, every felony has two ingredients. One is the proscribed conduct. The Congress that defines what is a crime, says you may not do certain things, and if you do, it is a crime if it is done with criminal intent.

In this case you are required to pay income taxes that are due. That is the conduct that the Congress says you must abide by. If you willfully evade the payment of a substantial portion of the taxes due, then the crime is defined in the statute. It is 7201, which I will come to soon. So the criminal intent is the willful evasion of a substantial

Charge of the Court

portion of the tax due, the wilful evasion, the state of mind, the intent with which the crime, the alleged crime was committed.

State of mind is rarely possible to prove by direct evidence. You cannot open someone's mind and look at it and testify to what you find there. So it is the surrounding circumstances.

Criminal intent is the one element that is usually proven through circumstantial evidence.

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THE COURT: (Continuing) Now, again the example of circumstantial evidence. Let us assume that you were sitting here in a civil case and Mrs. Jones, who is suing Mr. Smith, Mrs. Jones claiming Mr. Smith on a certain day while driving his 1974 Cadillac passed a Stop sign without stopping and struck her.

Mr. Smith says, "Oh, no, I stopped at that Stop sign and then I proceeded." That is the issue. It is identified. The plaintiff saying that the defendant passed the Stop sign without stopping; the defendant saying, "I stopped and then I proceeded."

Did the defendant stop before proceeding at the Stop sign? Again, let us assume that my Deputy Courtroom Clerk and myself were on the corner at the time of the accident.

I had my back to the Stop sign and assume he had his face toward the Stop sign and the roadway and had it in full view. If he were called to testify as a witness, since he had the Stop sign in his view, he could give direct testimony of that issue. He might testify, "I was talking to the Judge. I saw the 1974 Cadillac driven by a gentleman I now know as Mr. Smith, driving at about 65 miles an hour. He

passed the Stop sign without stopping and struck Mrs. Jones." Did I switch the male and female? I still have it right? I did. Plaintiff and defendant, I will say. And -- you see, I am thinking ahead of the next sentence, so I forget the individuals and that is not important. But that is the direct testimony of that issue.

Now, I had my back to the Stop sign so I could not testify directly on that issue. But I could testify as to surrounding circumstance from which the jury might reasonable drawn an inference that the defendant passed the Stop sign without stopping.

I might say, "I was talking to Mr. Adler, my Courtroom Deputy and through my peripheral vision, Mr. Jones --" have I got it right now -- Smith -- all right, Mr. SMith. "I saw Mr. Smith driving this white 1974 Cadillac at about 65 miles an hour and I lost sight of it and about three or four seconds later I looked to my left and there I saw the motor vehicle traveling at 65 miles an hour and it struck the plaintiff.

"The circumstances are that -- and I might say that I lost sightof the car for about 150 feet --

the circumstances are that the car was travelling at about 65 miles an hour and I lost sight of it for 150 feet, which means that it travelled that distance over that period of time, over two or three seconds.

"Then I saw it strike the plaintiff." And from those facts, those established facts, the speed of the car, the distance it travelled over that period during which period the Stop sign was in that area, I think you will agree with me that the fair and reasonable inference would be that that motor vehicle passed the Stop sign without stopping.

So there you have proof by direct evidence and proof by circumstantial evidence of the same contested fact.

The law does not regard one type of evidence as a better quality than the other. Sometimes direct evidence is of better quality. Sometimes circumstantial evidence is of better quality. The law requires the Government to prove the guilty of the defendant by both the direct and circumstantial evidence, by proof beyond a reasonable doubt.

I have used the term inference, I have used the term presumption I would like to define them:

Charge

An inference is a conclusion which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case and the example was circumstantial evidence. It is a discretionary conclusion based on experience and common sense.

A presumption, on the other hand, is a conclusion which the law requires the jury to make, and prevails unless proof, beyond a reasonable doubt, to the contrary, is shown, and the example of that of course is the presumption of innocence.

What is the evidence in the case? The evidence is the sworn testimony of witnesses regardless of who may have called them; exhibits received in evidence, regardless of who may have produced them; facts which have been admitted or stipulated by the parties; and facts which the Judge may have judicially noticed.

Now, I have not noticed any facts but I find that I should judicially take notice that the rate on taxable income during the year 1967 and 1968 is 48 percent, and that judicially noticed fact will be of some significance when I discuss -- what I would like to discuss later and that is the theory of

a constructive dividend that was referred to I think by one or both of the lawyers.

Now, there were many charts and schedules that were marked in evidence. Though marked in evidence, the charts and schedules are not strictly evidence.

You cannot arrive at your verdict based on charts and schedules. Even though marked in evidence. The evidence is the underlying documents and the testimony upon which the charts and schedules are based. They are just admitted for easy reference and as guides to evidence.

However, if any fact, figure, statement, is in the schedule and you find that it is not supported by the evidence, the testimony and the documents, just disregard that fact, because it has no validity unless supported by something in the record.

I would like to point out matters that are not in evidence: Statements made by counsel in their opening and summation are not evidence. They serve a very useful function and I have pointed the function out to you. Statements of the Court -- I do not recall making any -- but if I did, they are not evidence. Evidence that is stricken from the record, as I struck

it or directed that it be stricken physically from the Reporters notes, so you are figuratively to strike it from your mind and from your memory and certainly from your consideration in the case.

There were occasions that I sustained objections to questions. You may not speculate on what the answer might have been if the witness were permitted to answer. It is on the same theory and that is, I sustain objection to the question because, as a matter of law, I found it does not belong in the case, on whatever ground it might have been.

You cannot speculate on what the answer might have been because once I found it irrelevant or immaterial or improper, and not part of the case, you cannot consider it as such.

In this case the defendant offered a number of witnesses who testified to the good general reputation of the defendant for truth and veracity or honesty and integrity as a law abiding citizen. The jury should consider such evidence along with all the other evidence in the case.

Evidence of a defendant's reputation for truth and veracity or honesty and integrity or as a law-abiding citizen or that such traits have not been

questioned may be sufficient to warrant an inference of good reputation as to those traits of character.

Evidence of the defendant's reputation inconsistent with those traits of character ordinarily involved in the commission of the crime charged may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character in respect to those traits would commit such a crime.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. You the jurors are the sole judges of the credibility of their testimony and the weight their testimony deserves.

Scrutinize the testimony given and the circumstances under which each witness testified and each and every matter in evidence which tends to show whether a witness is worthy of belief.

Consider the witness' intelligence, his or her education, age, motive and state of mind. That means the reason for the witness testifying. The state of mind meaning the state of mind of the witness while testifying, the demeanor and manner of the witness on the stand, the witness' own ability to

observe the matters as to which he or she has testified, whether he or she shall have impressed you as having an accurate recollection of the matters to which the witness testified.

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Charge of the Court

THE COURT: (Continuing) ...The relation each witness may bear to either side of the case; the manner in which witnesses may be affeeted by the verdict; the extent which if at all the witness has been corroborated or contradicted by other testimony in the case.

A defendant who wishes to testify is competent as a witness. You must judge his testimony in the same manner as any other witness that appeared before you. If a witness is shown to have knowingly testified falsely, concerning a material matter, you have the right to distrust all such witnesses' testimony or you may decide to accept such a part of it as you recognize as being believable.

Both sides have challenged the credibility of the witnesses on the ground before the witness took the stand they said something that was inconsistent with the witness's testimony at the trial. It's what we call impeaching evidence. It attacks the credibility of a witness. The defendant challenged the credibility of Mr. Mazzella on the grounds that he failed to have certain statements in his report which he testified to at the trial. You decide whether under all the circumstances that the failure in the prior

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Charge of the Court

statement or the inconsistent statement of a witness -- I am not referring to any particular witness but any witness -- is inconsistent with the testimony given at the trial.

If you determine what a witness said at a prior time is inconsistent, then you determine the effect that it has on the believability of that witness's testimony. You determine whether it's to a material or immaterial matter. You determine whether it is a normal variation or whether it is one that reflects on the credibility of the witness.

Of course, it is for you to decide what effect it has on the credibility of the witness.

Mr. Mazzella testified that a conference in or about September of 1972 -- don't take my word for the date. I just want to fix the event -- that the defendant said something about receiving some monies that he deposited into the corporate accounts from his mother.

Now, he testified that he said something else and you decide as one of your fact determinations, what he did say.

But where a defendant knowingly makes a statement, upon being informed that he is under investigation for

a crime, that tends to show his innocence and that statement is shown to be false and voluntarily, knowingly and intentionally made, then you may consider that statement in the light of all the other testimony in the case in determining whether this shows a consciousness of guilt.

The logic of it is that it is not ordinarily necessary for an innocent person to invent or fabricate an explanation or statement tending to establish his innocence.

Now, whether or not the evidence as to the defendant's voluntary explanation or statement points to a consciousness of guilt, and the significance to be attached to any such evidence are matters exclusively within the province of the jury. The Government must prove beyond a reasonable doubt -- if you find the statement was false -- that that statement was knowingly and voluntarily made. In other words, that the defendant knew that it was a false statement when he made it and made it intentionally and not just through some kind of misunderstanding or inadvertence or other innocent reason.

You have testimony before you about a flood. The question before you is whether or not the defendant

destroyed documents that were material to the issues of this case.

Of course, if the Government fails to prove that this defendant knowingly and intentionally destroyed those documents believing that they were material to the issues of this case, then just disregard that testimony about destruction. The defendant offered evidence that would explain the absence of the documents by saying that there was a flood and that the documents were mutilated by the flood and that he destroyed them because they were useless.

An attempt to suppress evidence by destruction of the physical evidence by a defendant after a crime has been committed is not, of course, sufficient to establish guilt. You may consider evidence of such destruction, if you find that they were destroyed and they were destroyed knowingly and intentionally, along with the other evidence in the case in determining the guilt or innocence of the defendant.

Whether or not such destruction shows a consciousness of guilt and the significance to be attached to any such attempt, are matters for the jury to determine.

Charge of the Court

There are two separate statutes that are made the basis of the counts in the indictment. The charge in counts 1, 2, 3, 4, 6 and 7 is that the defendant willfully and knowingly attempted to evade and defeat a large part of the income taxes due and owing by making and filing false income tax returns for himself and his wife -- that is in counts 1 and 2 -- and for his building corporations, Dotal, Horn and Manor -- I will be calling Story Book Manor, Incorporated as "Manor" and Story Book Homes as "Homes" -- by failing to include in those returns taxable income representing the proceeds of extras paid by purchasers of some 92 or 93 homes built and sold by the various corporations.

Of course, the claim is that the income from Homes represented extras also not included in the personal tax returns.

The defendant concedes that he directed the purchasers to make checks for extras payable to Elmer Hornberger and that he deposited them to his account in the total sum of approximately one hundred and fifty-five or one hundred and fifty-six thousand dollars for both years, 1967 and 1968.

Now, I have lumped them together. When you come to each individual count, you will consider them

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Charge of the Court

separately. In 1967 the claim is that he failed to report $42,786.19, and in 1968 that he failed to report $113,527.91. The charge is that the income tax returns do not reflect the proceeds representing the extras as taxable income.

The defendant testified -- I am just giving a brief resume of what he testified to concerning criminal intent -- testified that he relied upon his accountant, Canale, to prepare accurate tax returns and was not aware that the monies withdrawn from his personal account and deposited to the corporate accounts were posted as advances or loans. He believed and understood that the corporations reported the extras as taxable income and that the corporations paid the taxes thereon.

He testified he was under the impression that he paid a tax on the income charged to him as extras.

The Government claims that the direction to pay extras personally was a plan or scheme to cheat the Government of income taxes, that the defendant was aware of the manner in which the corporations reported monies deposited from the defendant's personal account, that he knew at the time that his and his corporate tax returns were signed and filed, that they failed to

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include as taxable income the proceeds of the extras.

The parties agreed that the extras that are due to Dotal, Horn and Manor, or if they were due to Dotal, Horn and Manor, are taxable to the defendant as a constructive dividend.

Now, the term has been used and I do not recall that it has been made clear as to what that means. It means that the amount of tax due from the defendant for 1967 and 1968, based on the extras that should have been paid to the corporations, should be taxed to the defendant as if they first gone to the corporations. They're subjected to a tax of 48% and the balance reported as taxable income to the defendant.

For example, each dollar that the defendant put into his personal account, he shouldn't be taxed as an individual for a dollar, because he would have only gotten this after it went to the corporations first and the tax of 48% made there, so he should be taxed as if he only received 52%. That is what we mean by a constructive dividend.

Now, counts 9 and 10 relate to Story Book Homes. You have heard it described as a sub Chapter S corporation or as a small business corporation.

Under certain circumstances, the stockholders

Charge of the Court

of a corporation -- and in this case the stockholder because there was only one -- can elect to be taxed as if he were doing business in his individual name, so that Homes was never obligated to pay a tax. But for the Government to know how much the defendant personally made in that business that Homes conducted, Homes was required to file an information return reporting all the income, deducting all the expenses, and showing what was taxable to Hornberger and the claim here is that all the extras that Homes earned is not reported, not because Homes evaded any taxes, but because the defendant Hornberger made a tax return which he knew and believed was erroneous because it did not contain those extras, but nevertheless filed.

That in substance is the difference in the charges of 9 and 10 and the other counts in the indictment.

Now, I would read Section 7201, but before I go any further, I would like to say that I am aware that it is very difficult for jurors to sit hour after hour listening to lawyers sum up and charge, and so I wouldn't be offended if you raised your hand and asked for a little break, and if you do not raise your hand, I will give it to you anyway later.

Charge of the Court

This charge may go on for another half an hour or more. Would you like a break now?

All right, take a short recess and we will come back.

(Jury leaves courtroom.)

THE COURT: It is only going to be a few minutes. We will make it two or three minutes and then I will bring them back.

I realize we are going late now.

Two or three minutes, gentlemen.

(Recess taken.)

(Continued on next page.)

Charge of the Court

(Jury returns to courtroom.)

Now, Section 7201 of Title 26 recites as follows:

"Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof," violates a section.

Now, the criminal intent set forth in the phrase: "wilfully attempts to evade or defeat the tax," involves two factors: Firt, an intent to evade or defeat the tax due the Government, and an awareness that cheating the Government out of taxes due is a violation of law; and, Paragraph 2, an act done in furtherance of such intent.

The criminal intent expressed in the statute contemplates that the accused had known and understood that during the years 1967 and 1968 the corporations, which are again, Dotal, Horn and Manor, and the defendant and his wife had taxable income as a result of extras paid by purchasers of Homes and that he nevertheless attempted to evade or defeat the tax thereon or a substantial portion thereof by purposefully and deliberately failing to report the income which he knew the corporations had during such calendar years and that he knew that it was his duty to state in his personal and corporate tax returns the income from those extras.

The indictment charges that the manner in which the accused attempted to evade or defeat the taxes due or by filing false and fraudulent joint income tax returns on behalf of himself and his wife in Counts One and Two, and in the other counts by filing false and fraudulent income tax returns in behalf of the corporations, by knowingly failing to report the income from extras. That's both on his own and the corporate tax returns.

The attempt to evade the tax must be a willful attempt; that is, it must be a plan in which the defendant was aware of what was in his tax returns, and that his failure to report it must be with a specific intent to keep from the Government a tax imposed by the income tax laws, which was the duty of the defendant to pay.

In other words, the attempt must be knowingly made with the purpose of seeking to defraud the Government of some substantial amount of income tax lawfully due from the defendant.

I will read Count One and you can follow it in part, only because part of it is in the memorandum of verdict.

Count One charges as follows: That on or about

the 11th day of April 1968, in the Eastern District of New York, the defendant Elmer E. Hornberger, a resident of Nissequoque, New York, who during the calendar year 1967 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1967, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of New York, a false and fraudulent income tax return on behalf of himself and his said wife, which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for the calendar year was the sum of $19,962.38 and that the amount of tax due and owing thereon was the sum of 4,369.47, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $62,648.57, upon which said taxable income there was owing to the United States of America an income tax of $23,703.74, in violation of Section 7201 of the Internal Revenue Code, 26 United States Code, Section 7201.

The Government must prove all the essential elements

of the crime charged by proof beyond a reasonable doubt. I will tell you what those essential elements of the crime charged are.

One, that a substantial amount of federal income tax was due and owing -- this is as to Count One only --

That a substantial amount of federal income tax was due and owing from the defendant and his wife for the calendar year 1967, in addition to the tax declared or disclosed in the defendant's tax return in the amount of $4,369.47 on the taxable income of $19,962.38.

That means that the Government must prove that beyond that which was reported and paid in the year 1967 -- in the joint return -- there was a substantial tax due and owing.

Second, the defendant knew that additional income taxes of a substantial amount was due and owing to the Government for the calendar year 1967.

In other words, that there was criminal intent -- that it wasn't just an oversight, that he knew he owed the additional taxes, and in this case that he knew that he owed on the extras and that he knew it wasn't paid, and that it wasn't reported.

Three, that the defendant wilfully attempted

to evade or defeat the additional tax with a specific intent to defraud the Government of such additional tax by knowingly and wilfully filing a false and fraudulent income tax return on or about April 11, 1968, in which he failed to report $42,686.19, upon which there was due and owing an additional tax to the United States of America in the amount of $19,334.27.

You won't find those figures anywhere in there. I am giving you this as the Government's claim and that's the testimony of Mr. Vilardi.

Now, Count Two almost reads in the same form that it was a joint return that was filed. The Government must prove beyond a reasonable doubt: One, that a substantial amount of federal income tax was due and owing from the defendant and his wife for the calendar year 1968 in addition to the taxes declared or disclosed in the defendant's tax return in the amount of $65,379.79.

Two, that the defendant knew that an additional income of a substantial amount was due and owing from him to the Government for the calendar year 1968.

Three, that he wilfully attempted to evade or defeat the additional tax with the specific intent to defraud the Government such additional tax by knowingly

filing a false and fraudulent income tax return on or about April 14, 1969, in which he failed to report $108,813.82, upon which there was due and owing an additional tax to the United States of America in the sum of $66,110.37.

Now, these figures for additional taxes must be adjusted substantially by taking into consideration the 48 percent that Dotal, Horn and Manor would have paid on the income that should have been paid to those corporations representing extras.

The Government does not have to prove the precise amount due, but it does have to prove that it was a substantial part of the tax owed, so I give you those figures only for that reason.

Now, Count Three is a charge under the same section charging the defendant with a wilful attempt to evade and defeat a substantial portion of the tax due from the corporations.

The Government must prove beyond a reasonable doubt the following essential elements of the crime charge:

One, that a substantial amount of federal income tax was due and owing from the defendant -- I am sorry, from Story Book Manor, Inc., in addition to the taxes

declared or disclosed on the corporate tax return in the amount of $385.68 on the reported taxable income of $1,753.07.

(Continued on next page.)

1 Charge of the Court

THE COURT: (Cont'd) You will find those two figures in the indictment because that recites the tax return that was filed.

Two, that the defendant knew that additional income taxes of a substantial amount was due and owing from the said corporation to the Government for the calendar year 1967.

Three, that the defendant willfully attempted to evade or defeat the additional tax with a specific intent to defraud the Government of such additional tax by knowingly filing a false and fraudulent income tax return on or about the 4th day of April, 1968, in which he failed to report $11,241.35 upon which there was due and owing and additional tax to the United States of America in the sum of $2,473.09. And so, similarly for the year 1968, the essential elements of Count 4:

One, that a substantial amount of Federal tax, income tax, was due from the Story Book Manor, Inc., in addition to the tax declared or disclosed in the defendant's tax return in the amount of $299.31 on the taxable income of $1,918.73.

Two, that the defendant knew that additional income taxes of a substantial amount was due and owing

from the corporation to the Government for the calendar year 1968.

Three, that the defendant willfully attempted to evade or defeat the additional tax with a specific intent to defraud the Government of such additional taxes by knowingly filing a false and fraudulent income tax return on or about April 25, 1969, in which he failed to report $37,049.50, upon which there was due and owing an additional tax to the United States of America in the sum of $12.960.

Now, "6" refers to Dotal.

If you recall, I dismissed "5" as a matter of law.

The essential elements of the crime charged in Count 6 is:

One, that a substantial amount of Federal income tax was due and owing from Dotal Corporation for the calendar year 1968, in addition to the tax declared or disclosed on the corporation's tax return, in the amount of $189.23, on the taxable income of $781.95.

Two, that the defendant knew that additional income taxes of a substantial amount were due and owing from the said corporation to the Government for the

calendar year 1968.

Three, that the defendant willfully attempted to evade or defeat the additional tax with the specific intent to defraud the Government of such additional tax by knowingly filing a false and fraudulent income tax return on the 25th day of April, 1969, in which he failed to report $14,221.91, upon which there was due and owing an additional tax to the United States of America in the sum of $3,441.71.

And "7" refers to Horn Enterprises. Horn.

The Government must prove all the following essential elements of the crime. They are all repetitious, all the same eseential elements, but the figures are different and I want to take the time to call all to your attention.

One, as to -- on Count 7 -- one, that a substantial amount of Federal income tax was due and owing from Horn Enterprises, Inc., for the calendar year 1967, in addition to the tax declared or disclosed in the corporation's tax return in the amount of $450.38, on the taxable income of $2,047.20.

Two, that the defendant knew that additional income taxes of a substantial amount were due and owing from the said corporation to the Government for

the calendar year 1967; and

Three, that the defendant willfully attempted to avade or defeat the additional tax with the specific intent to defraud the Government of such additional tax by knowingly filing a false and fraudulent income tax return on or about April 25, 1968.

I'm sorry. The tax return was filed on April 4; 1968 -- April 4, 1968, in which he failed to report $15,426 upon which there was due and owing an additional tax to the United States of America in the sum of $3,393.72.

Of course, if you recall, I dismissed Count 8.

Counts 9 and 10 are based on a different section of the Internal Revenue Code, and it really is knowingly, intentionally lying about the income.

You see, the others were willful evasion of taxes -- a substantial part of the tax due. You recall I told you that Story Book Homes, Inc., was not required to pay a tax but they were required to file a true and accurate income tax return. And so 7206 captioned "Fraud and False Statements," under sub-division (1):

"Any person who, willfully makes and subscribes any return, statement or other document, which contains

or is verified by a written declaration that it is made under the penalties of perjury in which he does not believe to be true and correct as to every material matter, violates this section."

Counts 9 and 10 charge that Elmer E. Hornberger willfully made and subscribed two U. S. small business corporation income tax returns, Internal Revenue Service form 1120-S, each of which was verified by written declaration that it was made under the penalties of perjury and that Elmer E. Hornberger willfully made and signed each return knowing full well that it contained a false material statement in that the income tax return for 1967 stated that the taxable income from the corporation was $4,633.98, whereas he well knew that the taxable income was $15,334.48, and that the income tax return for 1968 stated the taxable income for the corporation was $1,625.14, whereas he well knew the taxable income was $62,834.83.

The law provides that any person who willfully makes and subscribes any return which contains or is verified by written declaration that is made under penalties of perjury and which he does not believe to be true and correct as to the matters contained in the statement, is guilty of a crime

and violates that section.

Now, the defendant concedes the materiality of the alleged misstatement. The Government must prove in "9" and "10" by proof beyond a reasonable doubt:

One, that the income tax returns of Story Book Homes, Inc., for the year 1967, as set forth in Count 9, and for 1968, as set forth in Count 10, were made and signed by Elmer E. Hornberger.

Two, that the income tax returns in question were verified by a written declaration and they were made under the penalties of perjury; and

Three, that Elmer E. Hornberger did not believe the returns to be true and correct as to the matters set forth in Counts 9 and 10 respectively, as to the correct amount of the taxable income reported; and

Four, that Elmer E. Hornberger acted willfully at the times he made and signed those returns.

So, again here in criminal intent the Government must prove beyond a reasonable doubt that the defendant was aware that the returns as made and filed by Story Book Homes, Inc., 1967, 1968, were erroneous, that he did not believe it to be true

and this particular case, that he knew that the extras were not included in the taxable income, and that knowing that, he nevertheless filed it and when he made it, signed it and filed it, that he knew it was a violation of law to file a false statement.

Now, if the defendant had a good faith belief that the returns were correct when he made and signed them, then there is no criminal intent. The Government must prove beyond a reasonable doubt that he knew perfectly well that the extras were not included in those returns, and what the defendant believed to be true or not true when he made and signed the return obviously is a question of the state of mind, what he was thinking at the time, what he believed.

If the defendant signed a return in good faith, believed it to be true and accurate, then the Government has failed to prove that a crime was committed, even though there was a substantial error.

The Government must prove beyond a reasonable doubt that the returns were knowingly signed and wilfully made and filed.

8 Charge of the Court

I think I have described knowingly and willfully. To act knowingly is to be aware, to make a choice, to understand and know what one is doing, rather than an act performed carelessly, negligently, inadvertently or through some mistake.

When an act is done willfully, it is done with the specific intent to do that which the law forbids. In other words, the Government in effect must prove that it was done with intent to deceive the Government, to cheat the Government. The defendant is not criminally responsible for negligence, mistake or inadvertance in handling his accounts or in providing the information to his office help or his accountant in the preparation of an income tax return.

The defendant has testified that he was an extremely busy man, that he never examined the books of account of his corporations to determine how the payments made by him to the corporations were posted and never discussed the matters as to how extras were treated with his accountant, Mr. Canale; that he never examined the income tax returns that he signed, that might have made him aware that such payments were being treated as advances or loans.

9 Charge of the Court 1/02

If the Government proves beyond a reasonable doubt that the defendant had a conscious purpose in avoiding knowing the contents of the books of account of the corporations, and the matters contained in his income tax returns, in other words, if he refused to examine them and look at them and did that knowingly and consciously, then you may infer from that fact and all the facts and circumstances in the case, if such is the reasonable inference based on common sense and experience, that the defendant knew that the monies deposited from his personal checking account to the corporation accounts were entered on the books of the corporations as advances in loans and as such were not taxable as income either to himself or the corporations.

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THE COURT: (Continuing) Now, I had intended to read each count in the indictment and then the essential elements of each count, but I noticed that while I was reading the essential elements, you were looking at the memoradum of verdict and measuring it against what I was saying.

But so that you know how much is left out of that excerpt, I want to read all the counts in the indictment. I read Count 1. I do not think I read Count 2.

Count 2 refer to the joint tax return of Mr. and Mrs. Hornberger and again violation of Section 7201.

"That on or about the 14th day of April 1969, in the Eastern District of New York, the defendant Elmer E. Hornberger, a resident of Nissequogue, New York, who during the calendar year 1968 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1968, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of New York, a false and

fradulent income tax return on behalf of himself and his said wife, which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for said calendar year was the sum of $65,379.79 and that the amount of tax due and owing thereon was the sum of $26,600.76, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $174,183.61, upon which said taxable income there was owing to the United States of American an income tax of $92,711.13.

"In violation of Section 7201, Internal Revenue Code; 26 United States Code, Section 7201."

Count 3 refers to Story Book Manor.

"On or about the 4th day of April, 1968, in the Eastern District of New York, the defendant Elmer E. Hornberger who was the president of Story Book Manor, Inc., a corporation, did wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by the said corporation to the United States of America for the calendar year 1967, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of

New York, a false and fradulent income tax return which was filed with the Internal Revenue Service wherein he alleged that the taxable income of the corporation for the said calendar year was the sum of $1,753.07 and that the total amount of tax due thereon was the sum of $385.68, whereas, as he then and there well knew, the taxable income of the corporation for the said calendar eyar was the sum of $12,994.42, upon which taxable income the corporation owed to the United States of America a total tax of $2,858.77. "

Count 4 refers to Manor for the year 1968.

"That on or about the 25th day of April, 1969, in the Eastern District of New York, the defendant Elmer E. Hornberger, who was the president of Story Book Manor, Inc., a corporation, did wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by the said corporation to the United States of America for the calendar year 1968, bu preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of New York a false and fraudulent income tax return, which was filed with the Internal Revenue Service wherein he alleged that the taxable income

of the corporation for the said calendar year was the sum of $1,918.73 and that the total amount of tax due thereon was the sum of $299.31, whereas, as he then and there well knew, the taxable income of the corporation for the said calendar year was the sum of $38,968.23, upon which taxable income the corporation owed to the United States of America a total tax of $13,260.21."

Count 6 is Dotal Building for 1968. It charges:

"On or about the 25th Day of April 1969, in the Eastern District of New York, the defendant Elmer E. Hornberger, who was the president of Dotal Building Corporation, a corporation, did wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by the said corporation to the United States of America for the calendar year 1968, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed in the Eastern District of New York a false and fraudulent income tax return, which was filed with the Internal Revenue Service, wherein he alleged that the taxable income of the corporation for the said calendar year was the sum of $781.95 and that the total amount of tax due thereon

was the sum of $189.23, whereas, he then and there well knew, the taxable income of the corporation for the said calendar year was the sum of $15,003.86, upon which taxable income the corporation owed to the United States of America a total tax of $3,630.94."

Count 7 -- this refers to Horn Enterprises.

"That on or about the 4th day of April, 1968, in the Eastern District of New York, the defendant Elmer E. Hornberger, who was the president of Horn Enterprises, Inc., a corporation, did wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by the said corporation to the United States of America for that calendar year 1967, by preparing and causing to be prepared, by signing and causing to be signed and by mailing and causing to be mailed, in the Eastern District of New York, a false and fraudulent income tax return which was filed with the Internal Revenue Service, wherein he alleged that the taxable income of the corporation for the said calendar year was the sum of $2,047.20 and that the total amount of tax due thereon was the sum of $450.38, whereas, as he then and there well knew, the taxable income of the corporation for the said calendar year was the sum of $17,473.20, upon which taxable income the corporation

owed to the United States of America, a total tax of $3,844.10."

Count 9 and 10 refers again to Homes.

Count 9, and this is based on 7206, subdivision 1:

"That on or about the 4th day of April, 1968, in the Eastern District of New York, the defendant Elmer E. Hornberger, a resident of Nissequogue, New York, did wilfully and knowingly make and subscribe a 1967 United States Small Business Corporation Income Tax Return, Form 1120-S, as president of Story Book Homes, Inc., which was verified by a written declaration that it was made under the penalties of a perjury and was filed with the District Director of Internal Revenue for the Internal Revenue District of Brooklyn, at Brooklyn, New York, which said United States Small Business Corporation Income Tax Return he did not believe to be true and correct as to every material matter in that the said income tax return stated the taxable income for said corporation was $4,633.98 whereas, as he then and there well knew ahd believed, the taxable income was $15,334.48."

"In violation of Section 7206(1), Internal Revenue Code; 26 United States Code, Section 7206(1)."

Count 10, charges a violation of 7206(1) for

the year 1968 as follows:

"That on or about the 25th day of April, 1969, in the Eastern District of New York, the defendant Elmer E. Hornberger, a resident of Nissequogue, New York, did wilfully and knowingly make and subscribe a 1968 United States Small Business Corporation Income Tax Return, Form 1120-S, as president of Story Book Homes, Inc., which was verified by a written declaration that it was made under the penalties of perjury and was filed with the District Director of Internal Revenue for the Internal Revenue District of Brooklyn, at Brooklyn, New York, which said United States Small Business Corporation Income Tax Return he did not believe to be true and correct as to every material matter in that the said income tax return stated the taxable income for the said corporation was $1,625.14 whereas, as he then and there well knew and believed, the taxable income was $62,834.83."

Now, I will just make a few brief observations on some matters that were said in the summation that might be a little confusing to you.

Eliminate from your consideration totally that the Government may have a civil action and may recover

the taxes due. That is no part of this case. None at all. The statement by Mr. Bender that in Mr. Rizzi's lawyer's opinion there was nothing wrong in Mr. Hornberger's request directing Mr. Rizzi to make it payable to him personally, has nothing to do with this case either.

His opinion is totally worthless. He is not here to be cross-examined as to his opinion and just disregard it entirely. That is only a matter between Mr. Rizzi and Mr. Rizzi's lawyer. It has nothing to do with this case at all. And the same thing with Mr. Greshim's puzzlement about why it was done and so forth.

You will decide whether what Mr. Hornberger did was done knowingly and was a wilfull attempt to evade a substantial portion of the tax. And that is -- I am referring to all the counts except 9 and 10.

Mr. Rizzi's lawyer's opinion and Mr. Greshim's opinion are totally irrelevant to those issues.

The same thing might be said to the plea of Mr. Bender about, let this man go home to his wife and children. That has nothing to do with this case. Punishment is for the Court. If you find him guilty then I will determine what punishment should be imposed.

Charge

Eliminate that from your consideration entirely. The consequences of your finding him guilty have no place in your consideration.

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THE COURT: (Continuing.) You decide his guilt or innocence based upon the evidence and nothing else. Do not be concerned aboutthe consequences.

The jury will be excused for a few moments. Do not start your deliberations on the matter and I will call you back into the Courtroom again.

(Jury leaves Courtroom.)

THE COURT: First, Mr. Ryan, any objections or exceptions to the charge?

MR. RYAN: I have no objections that would require further instructions. I just wanted to point out that on the constructive dividend, this 48 percent was alltaken into account in the computations by Mr. Vilardi.

THE COURT: Really?

That's not the way I understood it.

MR. BENDER: That's new to me.

MR. RYAN: I think any further instructions might further confuse the jury.

THE COURT: Well, if you do not want the instructions, it is not material. Mr. Bender?

MR. BENDER: I think you ought to charge unanimous verdict.

THE COURT: I forgot to do that. I will charge them on unanimous verdict, viewing the evidence. I just went so long that I forgot the routine matters. I realized it when I excused them.

MR. BENDER: That is why I just called it to your attention, and that they could have the transcript read.

I see you decided to lay off the venue.

THE COURT: I did that purposely. I am not giving them the issue of venue.

MR. BENDER: I wanted to call these things to your attention.

There are two points that I want to indicate. You indicated that the defendant did not report income from extras owed by the corporation. Then you said the defendant contends that he paid a tax on the extras he received --

THE COURT: He believed he paid a tax.

MR. BENDER: I think in view of the fact that you got individual returns and you got corporate returns --

THE COURT: 9 and 10 I was thinking of.

MR. BENDER: The way it came out, it looked as if the defendant thought that --

THE COURT: Didn't I say that he believed he

paid the tax?

MR. BENDER: I believe you said something like he believed or said that he paid the taxes.

THE COURT: Well, you tell me. I was very careful to say that the defendant testified that he believed the taxes were paid on all these extras.

I did not use those words?

MR. BENDER: Yes.

What I am trying to say, I do not want the jury to think that the defendant said -- as you pointed out when he spoke to Mazzella -- that I believe the corporation was paying all the taxes and then that he also was paying the taxes on his own returns.

THE COURT: He'd have to pay on the extras under Homes -- the subchapter S corporation.

Of course he would have to pay it. That is what I was referring to.

MR. BENDER: If you limited it to that --

THE COURT: I don't know how they interpreted it. I assume they did the way you did.

You tell me how to correct it.

MR. BENDER: When you told the jury that the defendant believed that he was paying his taxes, what he was referring to was the taxes that he would

have had to pay on his own individual returns with regards to Counts 1 and 2 -- 9 and 10 which are the subchapter S, and the corporationwas paying the proper taxes on the extras, and that the corporation should have picked up the tax because he would not normally say "I pay taxes on my own return on a constructive dividend" which he never even claims that he received.

THE COURT: I might say that I dictated all this and did not have an opportunity to read it. While I was going over it I saw so many errors and I had to look at different documents to correct them, because in every one of the cases my secretary typed -- I just did this early this morning at 8:30 -- on the corporate returns that he failed to pay and he made the return and she had "he and his wife" because she copied the form from the first two.

I could have said that he believed he paid the taxes --

MR. BENDER: The only reason I made a point of it is because Mr. Mazzella, I believe, testified on redirect examination that the defendant had told him that he had paid the taxes on his own individual return.

THE COURT: All right.

MR. BENDER: I most respectfully point out that your definition of a constructive dividend is something I, of course, take issue with. I think I explained that to you before that in order for there to be a constructive dividend, the government must prove certain basic conditions under 316.

THE COURT: I just wanted them to know when somebody used "constructive dividend" that they were talking about it as if it came to Hornberger from the corporation.

The disagreement you have with the charge is the same that you stated before, that the government must prove that there were no other credits due and that all of this was taxable income?

MR. BENDER: Yes.

THE COURT: All right.

MR. BENDER: I wanted to point out to you, I agree with you to the extent the corporations had to pay -- an additional tax on the proposed civil taxes must be considered in determining earnings and profits, but where I disagree with you is that it is not only reduced -- that earnings and profits are not only reduced by the amount of tax that the government claims is due from the corporations in the indictment, but it's the civil figures --

THE COURT: All right, that the reduction would be the reduction of the tax at the higher rate -- I recognize that.

MR. BENDER: But the actual figures are much greater of the proposed civil deficiency against the corporations than the figures in the indictment and that is what the revenue agent's report shows.

THE COURT: That is why I think it is unimportant. If theywould have had to prove the exact amount, then I would be interested in making certain that the computations were correct.

The government says -- and I see Mr. Vilardi shaking his head -- that you have already given the 48 percent.

Is that true, Mr. Vilardi?

MR. VILARDI: Yes.

THE COURT: Did you make that clear?

MR. RYAN: I didn't go into it.

MR. BENDER: It is not in the record.

MR. RYAN: It is in the documents furnished to you by the government.

He gave his opinion as to what the tax deficiency was. I didn't elicit it on direct examination. That was all taken into account.

THE COURT: You then certainly have no

complaint. Even if it is wrong, I do not know what the rate would be. There is nothing in the record that would indicate it.

If you can show me now that the government's figures are wrong, I will charge the jury that it is less. I do not think it is important. I think still it would be a substantial amount, even at the lower figure.

MR. BENDER: I do not think so.

THE COURT: You give me the figures then.

MR. BENDER: I have them here in the revenue agent's report.

THE COURT: You certainly did not examine him very carefully after those figures went in.

I assumed that they were correct. Those are the figures that I used from that schedule that you objected to and you didn't contest the figures -- you didn't cross-examine him.

MR. BENDER: You stopped me when you said I shouldn't go into the issue of law.

THE COURT: Not on that.

Mr. Vilardi testified to every figure he put in as the tax.

MR. BENDER: That was from the indictment.

THE COURT: You never asked him if it would be

lower and whether he had given credit for the 48 percent that the corporation would have paid. You never asked that question.

MR. BENDER: That is right.

We had a recess --

THE COURT: I will show you how I underscored it.

This was Mr. Vilardi's testimony (indicating).

Has this been marked as an exhibit?

MR. RYAN: Yes.

THE COURT: What is the number?

These are the figures that I used. This is the testimony that was given.

MR. BENDER: According to the IRS report for 1968, the deficiency and income is $16,600 and --

THE COURT: For Hornberger personally.

MR. BENDER: Dotal, 1968.

THE COURT: Let me get it.

The Dotal deficiency is what?

MR. BENDER: The statutory deficiency, according to the revenue agent's report of Dotal for December 31st, 1968 is $25,495.70.

THE COURT: I have the additional taxable income to be $15,003.

MR. BENDER: That is just for criminal purposes,

but not for civil purposes. I am giving you the revenue agent's --

THE COURT: I do not know what the differences are or should be.

MR. BENDER: That's what I am trying to give you.

What you did was that you just took the criminal figures in the indictment.

What I am saying --

THE COURT: If it is owed, it is owed.

MR. BENDER: There is much more. There is much more they propose to assess --

THE COURT: Maybe they computed it higher.

MR. BENDER: What I am trying to say, when you use the earnings and profit of the corporation to see if there is enough to construct a dividend, you must consider not just the 48 percent of the criminal figures, but you consider 48 percent of the total civil figures assessed.

THE COURT: I told you what my theory was.

MR. BENDER: Okay.

THE COURT: Dotal paid a tax in 1968 and they paid a tax -- where is it -- Dotal paid a tax of $189.23 on taxable income of 781.95. I think you could reasonably infer that they took every possible

credit that they could , loss carried forward, loss carried back, loss from the sale of land -- everything -- and that's what they came up with a taxable income of.

When they showed that there was an unreported income of$15,003.86, then how can you figure it as being anything else but additional taxable income that would be subject to a dividend -- that it was earnings and profits -- no matter how you figure it.

You and I know that earnings and profits is a very uncertain term and sometimes it very well depends on what the officers or the directors decide to call it or how they keep their books.

All I say is that as a matter of admissibility of evidence I find the jury can infer that this is earnings of profits from which dividends could have been declared.

If this corporation had been in debt over the years and maybe a couple of merges, and you couldn't' tell what the tax benefits were in the merges, maybe you'd have something -- I doubt it. I do not find Dicenso (phonetic) as supporting your position.

MR. BENDER: I have two other comments.

MR. RYAN: Before we leave that, the Vilardi schedule is 146 through 146-D.

THE COURT: I want the record to show it and I am going to mark it on mine.

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MR. BENDER: I have two further observations.

In view of the fact that the Government brought out on direct examination, the conversation as to the closing -- what took place about the fact that Mr. Hornberger had asked his client, Mr. Walsh, to endorse over the check to Mr. Hornberger for the extras, I thought the Rizzi Statement -- which I didn't bring out -- was brought out on the direct examination of the government --

THE COURT: Yes.

MR. BENDER: -- was very crucial, since it shows that some lawyers -- at least this lawyer for Rizzi that didn't think there was anything in and of itself that -- namely, the mere asking of the buyer to make the check out -- wasn't proper.

I think therefore, it is very late for you to try to erase from the jury's mind what Gresham said and at the same time, just take the skids out on what Rizzi said.

I think in view of what Gresham said, I think Gresham should stay there, and I think you should let in what Rizzi said. It was evidence brought out by the Government. I wasn't interpreting it. It wasn't stricken --

THE COURT: That is the most charitable way that

anyone can look at your statement.

What you are really saying is that even Rizzi's lawyers saw nothing wrong in it, and even Gresham was puzzled and so therefore, Mr. Hornberger, who was just a layman -- what do you expect of him?

What could Mr. Rizzi's lawyer say? He said "What the devil. Go ahead. There's nothing wrong with it. Hornberger is the builder, who's going to claim you are paying the wrong man."

That's what he is saying.

Mr. Gresham's puzzlement was really wonderment to think that the corporation would direct that excess be paid to the individual, but you brought that up and you argued from that that Mr. Hornberger -- a layman -- couldn't possibly be charged with criminal intent, when lawyers are puzzled.

MR. BENDER: No, I did not mean that. I meant the mere acting of itself --

MR. RYAN: It sounded like that.

THE COURT: That was obvious to me.

I won't change a word.

MR. BENDER: This brings me to the last thing: The defendant's contentions should have been instructed I think the jury should have known what his contention was as a defense to these charges.

THE COURT: I did that.

MR. RYAN: Yes.

MR. BENDER: No.

THE COURT: I did that to a greater extent than I intended.

MR. BENDER: One thing you did not tell them.

I say this with the greatest respect. You did not tell them -that the defendant contends that he had this purpose in directing that the checks be made to him and deposited, and that if he really intended to hold it for the corporations -- and that's the only reason why he put it into the account, so the corporations shouldn't be responsible -- and then returned it with that intent to give it back, that certain consequences must flow from that.

That's the defendant's contention that I think your Honor -- I say this most respectfully -- didn't give the jury.

THE COURT: I gave it in a general way. I am not going to give it to them at this point. I told them what the intention had to be, to deprive the government and that includes intention to -- that includes the negative of the intention to hold it for the corporation, and I will not restate that position

that you have been restating to the jury any number of times.

MR. BENDER: Beyond that, I do want to say, while you didn't use the magic words on wilfulness, namely, the presence of evil motive or bad motive, I personally feel it has been sufficient.

THE COURT: You know why I don't use it? I am embarrassed. What does that mean? I would rather say it was done knowing and intending to violate the law and he knew he was violating the law.

MR. BENDER: I am saying for the record that I am satisfied with your definition.

THE COURT: That is one phrase I just refuse to use, only because I am a little embarrassed to say it. I do not know what it means.

All right, please call the jury in.

I am going to ask the jurors to choose their dinner. I cannot conceive of them coming in in two hours. I would like to stay until seven or eight o'clock.

(Jury present).

THE COURT: I do not know whether I misstated a portion of the defendant's testimony and his position, but to make certain that I did not ,I would like to repeat what I recall the defendant to have testified to,

and what his position is.

Your recollection, incidentally, is what counts and I will tell you shortly, you could just ask for any of the testimony during your deliberations.

The defendant said that he believed that he was paying the taxes on the excesses that were chargeable to him.

In other words, those that were reported by Story Book Homes, Incorporated for 1967 and 1968, when he signed his individual joint return for 1967 and 1968.

If I didn't say it that clearly before, you now have it.

Now, you will shortly be excused to deliberate on the matter before you. A jury verdict is really twelve verdicts that all the jurors agree on. Each juror must decide the case for himself or herself, but it is wrong for any juror to take an intransigent position where you become fixed and refuse to budge, and refuse to talk to your fellow jurors. That is wrong. The jury process is a deliberative process, one where you go over the evidence with your fellow jurors. If you have arrived at a tentative verdict and then after discussing the matter with your fellow jurors, you realize you were wrong in the first place,

you have an obligation to give it up and change provided you do it logically and based on the evidence.

The other wrong is for a juror tO refuse to be bothered with the case, to abandon his or her obligation, and say in effect, "well, you know, they call me good-time Charlie or good-time Clara. Whatever you say is all right with me. I never argue."

That is wrong, too. The verdict must be your own verdict, not someone else's.

As I say, go over the case, go over the evidence, and when you have arrived at a unanimous verdict, you will report it to the Court. Do not tell me how you stand during your deliberations. Do not tell me you are ten to two or six to six or eleven to one. When all twelve have agreed, just send me a note -- and it is always through your Foreman -- that you have arrived at a verdict. Do not tell me what the verdict is.

Just tell me that you have arrived at a verdict. The first time a verdict is reported is when I call you into the courtroom and ask the Foreman to stand and I ask what the verdict is, and then it is recorded by the Reporter. That is when the verdict is reported and not before.

Now, when that happens -- when you tell me you have a unanimous verdict, I will ask the Foreman to stand

and, in effect, say, "In the matter of the United States of America against Elmer E. Hornberger, how do you find the defendant on count one, guilty or not guilty?"

You will then report your verdict.

I will then ask as to Count two, guilty or not guilty, then I will go through all the eight counts.

Then you will sit down and I will ask juror number two, whether she has heard the verdict as rendered by the Foreman and whether it is her verdict, and then with juror number three, and so on to juror number twelve.

When everybody agrees in open court, then we have a verdict.

During your deliberations, you may want to hear some testimony or see some of the exhibits. If you want all the exhibits, just ask for all of them and they will be sent in. They are quite voluminous, so if you ask for a specific one, I will have it sent in.

When you ask for testimony, please identify the witness, and if you can, the subject matter, and we will try to give you just what you want, or read the testimony to you, and then, if you want more, you will go back and tell me that you want more than I gave you.

All communications should be through your Foreman. You will get pencil and paper and the memordndum of verdict does not have any particular value. You can write on it, you can make notes on it, you can destroy it if you want to.

I would want the Foreman to sign his memorandum of verdict, so therefore, I will give you an extra copy when you go in.

Suppose you give it to him now.

(Document handed to Foreman.)

Now, will the Clerk please swear in the Marshals.

(Marshals sworn.)

THE COURT: You are about to be excused to deliberate on the matter before you. I call your attention to the oath that you took and that is to return a true and just verdict and that means a verdict based upon the evidence and in accordance with the law as I have charged it, free of all bias, prejudice and sympathy.

If you do that, then neither side can complain.

The jury is excused for deliberation on the matter. I will send another menu in to you and you will make your choices.

In case you are here beyond six o'clock, we will have dinner for you, and we will have it in, unless

you all decide to eat out. I am reluctant to send jurors out to restaurants, because they are far from the courthouse and they are usually crowded, and it takes two and a half to three hours for you to go and come back.

I prefer this method. We will send the menus in to you and you may make your choices.

The jury is excused.

(Jury leaves courtroom).

THE COURT: I would like you to keep in close contact with the Clerk for the next fifteen minutes and if you go anywhere, please let us know where you are going.

MR. BENDER: Thank you.

MR. RYAN: Thank you.

(Continued on next page.)

(The following occurred in the absence of the Jury at 4:35 p.m.)

THE COURT: I have the first note from the Jury. They want contracts, checks to mother, schedules IRS, schedules for Mr. Hornberger.

Now, if you can agree on what that is, get together privately while I continue doing what I am doing here, and if there is a disagreement, then I will pass on it.

THE CLERK: Note from Jury marked Court's Exhibit 5 for identification.

(So marked.)

(Recess taken.)

(The following occurred in the absence of the Jury at 4:40 p.m.)

THE COURT: In the other case, did the lawyers agree on the documents that would go in? Mr. Mazzella, did the lawyers agree on the documents that were to go into the Jury?

MR. MAZZELLA: I don't believe so.

(Recess taken.)

(The following occurred in the absence of the Jury at 4:45 p.m.)

THE COURT: All right, gentlemen, on the note I received, have you arrived at an agreement?

MR. WOLFSONT: We have the checks.

THE COURT: May I see it? Let's check of what they are asking for.

THE CLERK: All right, Judge.

THE COURT: Where is the note?

THE CLERK: Mr. Ryan, may we have the note, please, the Jury note?

THE COURT: May I see the note?

Contracts. I suppose that means all the contracts? Right?

MR. WOLFSONT: Here are the sixty contracts that were admitted as Defendant's Z, with a schedule.

THE COURT: How about the other?

MR. RYAN: We had a few.

THE COURT: Are there any in addition to that?

MR. RYAN: Yes, there is a contract that's marked as a Government Exhibit.

THE COURT: All right. Checks to mother. Schedules IRS. Are those the schedules? Are those the only schedules?

MR. WOLFSONT: The defendant's schedules.

MR. RYAN: Just a moment. IRS schedules, I talked to Mr. Bender and we agreed that the Vilardi schedule of taxes and the Mazzella schedule of allocations.

THE COURT: The Vilardi schedule of tax was not admitted into evidence?

MR. RYAN: Yes, they were.

THE COURT: They were?

MR. RYAN: Absolutely.

THE COURT: At first he opposed it, as I recall.

MR. RYAN: That's right, but then it was simply recapitulation of his testimony.

THE COURT: Do you have it marked in evidence?

THE CLERK: Yes. That's 146 through 146D.

MR. RYAN: The Vilardi schedule, the Mazzella schedule and the schedule of these advances.

THE COURT: Schedules IRS. Where is Mr. Bender? Do you agree that those schedules should go in? It is a question of interpreting what they want. Schedules of Mr. Hornberger. Schedules IRS.

What other schedules do you have besides Vilardi?

MR. RYAN: I think that's in essence the Government's case.

THE COURT: Is that it?

MR. RYAN: Right.

THE COURT: You agree then that's it? All right. Then take it.

MR. RYAN: All right. I have a contract here

of Mr. Campbell.

THE COURT: All right.

MR. RYAN: You check your records.

THE COURT: I think there is a Campbell contract in there but --

MR. RYAN: Let's have that bill, too. Would you like a recitation of the exhibit numbers?

THE COURT: Yes. Exhibit BB, nineteen checks are going in. Campbell contract, Exhibit 127. Contracts, Exhibit C, and the schedule that summarizes the information of contract, AA, and the Government is offering what?

MR. RYAN: An additional contract involving Waugh, 122.

THE COURT: Right.

MR. RYAN: As far as schedules, Exhibits 110A, attached to 110, 111A attached to 111, 109A attached to 109. The schedule of computations by Vilardi, 146 through 146D, and the Mazzella schedules, 145. That's the sole number.

THE COURT: Is there any objection to any of these.

MR. BENDER: I don't think so. I think I went over it with Mr. Ryan. I think they asked for IRS schedules, so I think that's okay.

THE COURT: Yes, they did.

MR. BENDER: That's okay. Here is the defendant's schedule.

THE COURT: I just want to make sure they are in evidence.

MR. BENDER: Oh, yes.

MR. WOLFSONT: All in evidence.

MR. BENDER: All in evidence.

THE COURT: All right. Turn it over to the marshal. The marshal will turn it over to the foreman.

Do you have the menus?

THE CLERK: They have everything.

THE COURT: All right. As soon as you get the orders --

THE MARSHAL: And also phone calls.

THE COURT: Fine. Make phone calls.

Now, the marshall has gotten a request to make phone calls, I suppose to their homes and tell them they will be late. I have asked the marshal to pick up their orders and as soon as the orders come in, I will advise them that they will not hear from us, I won't be able to answer their communications for maybe an hour or an hour and a quarter. I do not know whether you can get to Gage and Towners and be back

by then. That will give us a chance to have our dinner.

MR. BENDER: So we will know when they are going to start there dinner?

THE COURT: As soon as I see the dinners delivered, then we will go.

MR. BENDER: Very good.

(Recess taken.)

(Continued on next page.)

(The following occurred in the absence of the Jury at 7:45 p.m.)

THE CLERK: Note from Jury marked the Court's Exhibit 6 and note from Jury marked 7 for identification.

(So marked.)

THE CLERK: Government's Exhibits 4 through 13 in evidence were sent into the Jury.

THE COURT: I have a note. They are asking for Vicki Coletti examination on extras, Mr. Hornberger's examination on extras, to where they were to be put, Canale examination on extras. So look through the transcript.

I will start reading. When they have had enough I will ask them to put their hands up, but give me everything you can find on that in the transcript. Look at the note and you make up your mind.

Page 304. Is that male sale?

MR. RYAN: Main sale.

THE COURT: Oh, main sale.

MR. BENDER: Do you want any pages from me?

THE COURT: Yes.

MR. BENDER: On Coletti I have 121. This is on the direct. 121, 125.

THE COURT: Line?

MR. BENDER: I didn't give you lines. Just pages, your Honor.

THE COURT: Tell me where you say it should start. I do not see anything on 121 on extras.

MR. BENDER: Neither do I.

MR. RYAN: First page I have is 126. 125, your Honor.

THE DEFENDANT: 125 is the first page.

MR. RYAN: Line 13.

MR. BENDER: I have 127.

THE COURT: Down to 127.

MR. RYAN: I have through to page 131.

MR. BENDER: Nothing on 126.

THE COURT: I do not see anything after 127.

MR. BENDER: 130, on the bottom. "Was anything discussed about extras when he gave you these monies. No."

THE COURT: 130.

MR. BENDER: Bottom, last question and answer.

MR. RYAN: 130 deals with what he told her to put down, deposits.

THE COURT: That's right. I am only going to try to answer the Jury's question. If they want more, I will give it to them.

MR. BENDER: 134, line 7.

THE COURT: I will start at 130, line 18 because it does not have any meaning unless I give them -- to where? Where else, do you say?

MR. BENDER: 134, line 7.

THE COURT: 134, line 7. Bottom of 135, where you asked the question, "I guess that refers to extras, does it not?"

Then on to 136. I then jump to 148.

I don't know if anybody else has anything else? Then where?

MR. BENDER: I jump to 149. But in order to understand it, it starts as -- at 148 as to what record she was --

THE COURT: Line?

MR. BENDER: 17. She goes over what she had in the job files, over to extras, cards reflecting the extras ordered.

THE COURT: Anything after that?

MR. BENDER: 150, 19.

THE COURT: No. "There was a girl substitute that took care of extras." That does not talk about extras.

MR. BENDER: 151.

THE COURT: Same thing.

MR. BENDER: It speaks about the extra girl and

the -- the girl collected money for extras. I believe so.

THE COURT: All right. Page 151.

MR. BENDER: Lines 17 and 18.

THE COURT: I will not take lines out of testimony because it is a little confusing.

MR. BENDER: It goes right on from 10. This whole thing goes right down to "That is part of the policy to send out letters on extras."

THE COURT: All right.

MR. BENDER: That's down to 20 and it goes over to 152.

THE COURT: 22.

MR. BENDER: To 153.

MR. RYAN: I would urge the bottom of 153, line 21 onto the following pages. Again.

MR. BENDER: What did you say?

MR. RYAN: I would urge the bottom of 153 through 155.

MR. BENDER: I have 155 starts with extras. Top of the page.

MR. RYAN: That line doesn't mean anything unless you see the preceding Q and A.

THE COURT: That is right. These monies refer back to the so-called advances.

11

MR. BENDER: Yes. She doesn't specifically on 154 speak of extras but she does talk about money coming from --

THE COURT: I am going to call them in and give them this much and ask them if they want anymore because my experience is after a little while they raise their hands because everything in the case deals with extras. That is what the whole case is about.

Have your client sit at counsel table, please.

Seat the Jury.

THE DEFENDANT: Sorry, your Honor.

(Jury present.)

THE COURT: I will try to give you the testimony that you want on extras. It must be obvious that it is difficult to confine it to that subject matter, extras, because on the testimony of this case, of course, the advances must be discussed, too, so I may spill over into another subject.

However, if you do not want to hear what I am reading, just raise your hand and when you have heard enough of that particular witness' testimony, just raise your hand.

If all twelve raise their hands, then I will stop. If any one Juror wants to hear the testimony,

I will read it.

Now I am trying to give you what you want to hear. This is the direct testimony of the witness Vicki Coletti, beginning at page 125, line 13, examination by Mr. Ryan.

(Record read.)

THE COURT: That's page 127a, line 3.

Page 130, line 18.

(Record read.)

THE COURT: Starting at page 129, line 24.

(Record read.)

MR. RYAN: Line 23, your Honor?

THE COURT: Gentlemen, I will not just read what counsel think they ought to have before th e Jury. I am trying to give the Jury what I think they want to hear.

I have read that.

148, line 17.

(Record read.)

THE COURT: 151, line 4.

(Record read.)

THE COURT: 153, line 5.

(Record read.)

THE COURT: Hornberger, page 752, line 5. Hornberger direct testimony by Mr. Bender, 752, line 4.

(Record read.)

THE COURT: Now page 772, line 19.

(Record read.)

THE COURT: That is down to page 775, line 8. Cross-examination of Mr. Hornberger by Mr. Ryan. At the top of the page, line 2, page 817.

No, make that Hornberger direct by Mr. Bender, page 785.

MR. BENDER: No. 779, your Honor, I believe. Line 13.

THE COURT: All right. 779, line 13.

(Record read.)

THE COURT: When you take it out of context like that, it is absolutely meaningless.

MR. BENDER: Yes, but I think it goes on.

THE COURT: I will not continue that. I will go to page 785, line 20.

(Record read.)

MR. BENDER: Your Honor? Your Honor?

THE COURT: Yes?

MR. BENDER: Juror Number -- the foreman.

THE COURT: You have had enough?

JUROR NO. 1: Yes.

THE COURT: Anybody else? All?

All right. You may retire.

13a

T7R2

I haven't given you Mr. Canale's testimony but you have said you have had enough. All right.

(Recess taken.)

(Continued on next page.

(The following occurred in the absence of the Jury at 9 O'clock P.M.)

THE COURT: I intend to call the jury and tell them that if they want to disband, I'll do that and bring them back for deliberations tomorrow morning.

(Seat the Jury.)

(Jury present.)

THE COURT: I do not want to keep the jury too late. I will leave it up to you as to whether you want to suspend, but I suggest to you that we disband and that you resume your deliberations tomorrow morning.

I suggest that you go into the jury room, and if you want to do that, just send me a note. If you do not, tell me that you want to continue deliberating.

JUROR NO. 1: We want to continue deliberating, Your Honor.

THE COURT: You want to continue?

JUROR NO. 1: Yes.

THE COURT: All right.

(The following occurred in the absence of the Jury.)

THE COURT: All right.

(Recess taken.)

(The following occurred in the absence of the Jury at 9:15 P.M.)

THE CLERK: Note from Jury marked the Court's Exhibit 8 for identification..

(So marked.)

(Jury present.)

THE COURT: Mr. Foreman, will you please stand?

THE FOREMAN: Yes, Your Honor.

THE COURT: I have note saying, "The Jury has reached a verdict."

In the United States against Elmer E. Hornberger, as to Count 1, how to you find the defendant, guilty or not guilty?

THE FOREMAN: Guilty, Your Honor.

THE COURT: As to Count 2, how do you find the defendant, guilty or not guilty?

THE FOREMAN: Guilty, Your Honor.

THE COURT: As to Count 3, how do you find the defendant, guilty or not guilty?

THE FOREMAN: Guilty, Your Honor.

THE COURT: As to Count 4, how do you find the defendant, guilty or not guilty?

THE FOREMAN: Guilty, Your Honor.

THE COURT: As to Count 6, how do you find the defendant, guilty or not guilty?

THE FOREMAN: Guilty, Your Honor.

THE COURT: As to Count 7, how do you find the

defendant, guilty or not guilty?

THE FOREMAN: Guilty, Your Honor.

THE COURT: As to Count 9, how do you find the defendant, guilty or not guilty?

THE FOREMAN: Guilty, Your Honor.

THE COURT: As to Count 10, how do you find the defendant, guilty or not guilty?

THE FOREMAN: Guilty, Your Honor.

THE COURT: Do you find the defendant guilty as to all 8 counts?

THE FOREMAN: Yes, Your Honor.

THE COURT: Thank you.

Juror No. 2, you have heard the Foreman render the verdict. Is that your verdict?

JUROR NO. 2: Yes, it is, Sir.

THE COURT: Juror No. 3, is that your verdict?

JUROR NO. 3: Yes, it is.

THE COURT: Juror No. 4, is that your verdict?

JUROR NO. 4: Yes.

THE COURT: Juror No. 5, is that your verdict?

JUROR NO. 5: Yes.

THE COURT: Juror No. 6, is that your verdict?

JUROR NO. 6: Yes.

THE COURT: Juror No. 7, is that your verdict?

JUROR NO. 7: Yes.

THE COURT: Juror No. 8, is that your verdict?

JUROR NO. 8: Yes.

THE COURT: Juror No. 9, is that your verdict?

JUROR NO. 9: Yes.

THE COURT: Juror No. 10, is that your verdict?

JUROR NO. 10: Yes.

THE COURT: Juror No. 11, is that your verdict?

JUROR NO. 11: Yes.

THE COURT: Juror No. 12, is that your verdict?

JUROR NO. 12: Yes.

THE COURT: And so say you all.

Are there any motions you want to make before I discharge the Jury?

MR. BENDER: No, Your Honor.

THE COURT: I know that this was a difficult case because people and jurors and judges alike don't like to deal with figures normally, but I am satisfied that the defendant had a very able counsel, that he presented a good defense, that the jury examined charges very carefully and there arrived at a verdict that is supported overwhelmingly by the evidence.

Now, this is the last time you will probably sit in the Federal Court. Your jury service is at an end.

I know that it is not a pleasant duty to convict

defendant on any crime, but whoever said jury duty was pleasant, it's an obligation of the citizen.

So you are discharged with the thanks of the Court. You need not return, of course, and your service is at an end.

THE FOREMAN: Do we have to report downstairs? tomorrow?

THE COURT: No. There is no need to report.

Have you signed your verdict?

THE FOREMAN: Yes.

THE COURT: May I see it?

All right, thank you.

(The Jury is discharged, thank you.)

(THe following occurred in the absence of the Jury at 9:20 P.M.)

THE COURT: Will you wait in the courtroom, please?

THE DEFENDANT: Girls, you've got to come back.

THE COURT: I want to wait until the jurors leave the building.

Are there any motions?

MR. BENDER: I would, most respectfully, Your Honor, ask for some time for motion to set aside the verdict.

THE COURT: I offer it.

MR. BENDER: I frankly don't know if I really

will make such a motion, but I would appreciate the time.

THE COURT: The time to make all motions with respect to the verdict --

MR. BENDER: Five days?

THE COURT: -- is extended to the date of sentencing.

MR. BENDER: That would be fine, Your Honor.

THE COURT: All right.

MR. BENDER: And I would also most respectfully request the defendant be continued on his own recognizance up until the time of sentence.

THE COURT: Any objection?

MR. RYAN: No, Your Honor.

THE COURT: Defendant will continue on his own recognizance.

I would appreciate it if you remained in the courtroom until the jurors have left the building.

MR. RYAN: Do you want the defendant to report to probation tomorrow morning?

MR. BENDER: Whenever he has to come over. He has to come all the way from Smithtown. Should we call and arrange it?

THE COURT: Suppose I direct that the defendant report to the probation department on or before July 9,

and you try to make the arrangements, but I wanted it before July 9.

MR. BENDER: I will. Very good.

Will I need a slip for the Probation Department?

MR. RYAN: I don't think so.

MR. BENDER: Very good.

THE COURT: My courtroom deputy will give the information to the Probation Department.

It will take just a few moments before the jurors will leave the building, but I could see that the jurors were upset by the sobbing of the family.

MR. BENDER: I know.

THE COURT: And I do not think that they should be embarrassed by it.

(Time noted: 9:25 P.M.)

END OF CASE.

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding

Henry R. Shapiro

Official Court Reporter
U.S. District Court for the
Eastern District of N.Y.

REQUEST NO. 1

Under Counts 1 and 2, the Government claims this additional income was entirely derived from the payments to the defendant of the extras ordered and paid for by the customers in their transactions with the selling corporations.

The Government further claims that the payment of this "extra" money should have been reported by the defendant in the various corporation tax returns which are referred to in Counts 2-8 of the indictment. The Government asserts further that the receipt of the "extra" money by the defendant and his depositing of such funds belonging to the corporation into his personal checking accounts constituted income to him in the form of a constructive dividend, that is, that such payments by operation of law were a distribution of property made by the selling corporation to the defendant which should have been reported on his returns for 1967 and 1968.

Thus, the only way in which the Government can sustain the charges under Counts 1 and 2 with respect to the extra payments derived from Dotal, Horn and Manor is if they were received by the defendant as constructive dividends.

In order for the receipt of the extra money to constitute a constructive dividend to the defendant, the Government must prove beyond a reasonable doubt, in addition to the element of wilfulness that I have

elsewhere indicated, that the defendant exercised dominion and control of the extra money he received and treated it as his own to the exclusion of any interest therein by the corporations. The Government thus must show that the defendant exercised a claim of right to this money as money belonging to him and not the corporations.

The mere fact that the defendant deposited these extra payments in his personal checking accounts and comingled these extras with his personal funds does not constitute proof by itself that the defendant exercised such dominion and control over the funds as to conclude he considered them as his own.

Automobile Club of New York, 32 T.C. 906, (1959), aff'd. 304 F.2d 781 (2d Cir. 1962)

It must further be proved that he deposited those extras to the exclusion of any interest in the extras by the corporation. The undisputed fact that the defendant returned the moneys (extras) to the corporations in the same years involved may be considered by you as support for the defendant's claim that he held the extra payments in his personal checking accounts for the corporations and that he did not treat the funds as his own provided you conclude that the defendant did not direct, instruct the employees of the corporations to treat the deposits to the corporations as loans from him. If you conclude that the Government has failed to prove beyond a reasonable doubt that the defendant did instruct or advise that the extra moneys returned to the corporations were to be credited

to him as stockholder's advances, or that the defendant was consciously aware and had knowledge of the fact that the deposits were being credited to his stockholder's advance account as loans from him, then no inference whatever can be drawn against him by the entries in the stockholder's advances in determining whether the extras deposited to the corporations by the defendant were considered by the defendant as belonging to the corporations. See Mertens, Law of Federal Income Taxation, and cases cited, Vol. 2, §§ 10.07, 12.103, p. 401.

REQUEST NO. 2

The defendant claims that he directed the payment of extras be made to him instead of the corporation and thereafter deposited in his personal accounts the extra payments, in the belief this would relieve the corporation of any responsibility in the event the customer sought to make a claim about the extra work done. The defendant further claims that he held these funds belonging to the selling corporation involved with the intention of returning the funds to that corporation, which he asserts he did. It is undisputed that approximately $156,000 representing the total amount of alleged payment of extras to the defendant for both 1967 and 1968 were transferred from the defendant's personal bank accounts to the four corporations involved.

If you accept this contention of the defendant and further find that the entry of these amounts in the corporate books as stockholder advances was made without the defendant's instructions or knowledge, then you must acquit him on all counts because the Government will have failed to prove beyond a reasonable doubt that the defendant had the requisite wilfulness necessary to convict him of attempting to cheat on the corporation's and his own income taxes, as well as to wilfully make the false statements charged in Counts 9 and 10, even if you were to conclude that the corporations did in fact omit from their tax returns the payments for extras.

A 11643

JUDGMENT AND COMMITMENT (Rev. 2-68) Cr. Form No. 25

United States District Court

FOR THE

EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
SEP 13 1974
TIME A.M.
P.M.

United States of America

v.

ELMER E. HORNBERGER

No. 74 CR 251

On this 13th day of September, 19 74 came the attorney for the government and the defendant appeared in person and[1] with counsel

IT IS ADJUDGED that the defendant upon ~~his plea of~~ a verdict of guilty

has been convicted of the offense of violating T-26, U.S.C. Sec. 7201 and 7206(1), in that on or about April 4, 1968, April 11, 1968, April 25, 1968, April 14, 1969 and April 25, 1969, the defendant did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife, and said corporations, to the U.S. for the calendar years 1967 and 1968, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing a false and fraudulent income tax return on behalf of himself, said wife and said corporations, which were filed with the I.R.S.

as charged[3] in Counts 1,2,3,4,6,7,9, and 10

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] 1 year and 1 day on each of counts 1,2,3,4,6,7,9 and 10, said sentences to run concurrently. Execution of sentence stayed pending appeal

IT IS ADJUDGED that[5]

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to[6] _____,

United States District Judge.

_____,

Clerk.

[1]Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2]Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number _____" if required [4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court to recommend a particular institution.

FPI MI—6-5-69-10M-3659

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

-v- : NOTICE OF APPEAL

ELMER E. HORNBERGER, : 74 CR 251

Defendant. :

- x

NOTICE IS HEREBY GIVEN that Elmer E. Hornberger, the defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order denying the motion to set aside the verdict, or in the alternative for a new trial, and from the final judgment entered in this proceeding on the 13th day of September, 1974.

Dated: New York, New York
September 23, 1974

LOUIS BENDER
Attorney for Defendant
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